Precision Concrete *and* Building Trades Organizing Project. Cases 28–CA–14982, 28–CA–15431, and 28–CA–15431–2

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 23 and October 20, 1999, respectively, Administrative Law Judge Michael D. Stevenson issued the attached decision and supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief. The Charging Party filed an exception and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision, supplemental decision, and record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified below, and to adopt the recommended Order and amended Order, as modified.[4]

1. We agree with the judge that the Respondent failed to prove its affirmative defense that the 6-month limitations period in Section 10(b) bars litigation of an unfair labor practice allegation that Foreman Juan Pulido unlawfully prohibited employee Valentin Mendez from wearing a new prounion T-shirt while working in Pulido's crew. The General Counsel first raised the Pulido/Mendez allegation in a prehearing complaint amendment made 8 months after the event at issue. The merits of the Respondent's 10(b) defense therefore turn on whether the otherwise untimely amended complaint allegation is closely related to a timely filed unfair labor practice charge. We agree with the judge that the Pulido/Mendez allegation was closely related to one or more timely charges, but we discuss the matter further here in light of disagreement between the Board and the D.C. Circuit about how to analyze the "closely related" issue. See *Ross Stores*, 329 NLRB 573, 573–575 (1999), enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001). Even under the court's view, we find that the Respondent has failed to prove its defense.

There is a three-factor test for determining whether a sufficient relationship exists between an otherwise untimely allegation and a timely filed charge. See *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). First, the Board assesses whether the otherwise untimely allegation involves the same legal theory as the allegation in the timely charge. Second, the Board examines whether the allegations arise from the same factual situation or sequence of events. Third, the Board may look to whether the Respondent would raise similar defenses to both allegations.

In finding that the Pulido/Mendez allegation was closely related to an allegation contained in a timely filed charge, the judge's analysis of the second *Redd-I* factor relied on the rationale that the conduct at issue in the amendment was "part of a pattern of conduct by Respondent aimed at impeding the Union's organizing activities." The D.C. Circuit Court of Appeals has held, however, that proof of a pattern of conduct cannot be satisfied *solely* on the basis that separate alleged acts arise out of the same antiunion campaign. E.g., *Ross Stores v. NLRB*, 235 F.3d 669, 672–675 (D.C. Cir. 2001).

In this case, we find that all three *Redd-I* factors, including the second factual factor as interpreted by the D.C. Circuit, establish the requisite close relationship between timely and otherwise untimely allegations.[5]

The otherwise untimely allegation in the amended complaint is that Foreman Pulido violated Section 8(a)(1) of the Act in July 1998[6] by threatening to discharge Mendez because he wore a union T-shirt. There are two timely filed unfair labor practice charges relevant to this allegation: First, the Union's March 20 amended charge in Case 28–CA–14982, timely alleged, inter alia, that the Respondent violated Section 8(a)(1) when "[o]n

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We find it unnecessary to pass on whether the Respondent's foremen are supervisors within the meaning of Sec. 2(11) of the Act, inasmuch as we affirm the judge's alternative finding that the foremen are the Respondent's agents under Sec. 2(13). Their conduct is attributable to the Respondent on that basis. See, e.g., *Cooper Hand Tools*, 328 NLRB 145 (1999).

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

We will modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[5] To the extent that the analysis set forth by the Board in *Ross Stores* differs from that of the D.C. Circuit in that case, we respectfully adhere to the Board's view and find that it provides an additional basis for rejecting the Respondent's 10(b) defense. See *Seton Co.*, 332 NLRB No. 89, slip op. at 4, 6–7 (2000).

[6] All subsequent dates are in 1998.

or about February 13, 1998, [the Respondent] interrogated employees, threatened employees with unspecified reprisals, and invited employees to resign their employment because they engaged in protected, concerted activity." Second, the Union's September 17 charge in Case 28–CA–15431–2, timely alleged, as one of a series of unlawful actions occurring from July 30 through September 10, that the Respondent violated Section 8(a)(1) when "[o]n or about August 25, 1998, [the Respondent] threatened employees with termination and physical violence because of their union activities."

We have examined the relationship of the timely unfair labor practice charge allegations to the otherwise untimely amended complaint allegation with respect to the three *Redd-I* factors. As to the first factor, we find that all allegations involve the same section of the Act and theories of threatening conduct that interfered with employees' Section 7 rights to select the Union as their bargaining representative. As to the second factor, we find that all allegations involve types of threatening conduct by the Respondent's unnamed officers and agents occurring within a common sequence of events in a half-year time span. Finally, as to the third factor, we find that the defenses to these allegations are essentially the same: that perpetrators of the threats were not Respondent's agents or supervisors, that the testimony of the General Counsel's witnesses was not credible, or that the alleged conduct did not reasonably tend to threaten, coerce, or interfere with employees in the exercise of their Section 7 rights.

Based on the foregoing, we conclude that the Respondent has failed to prove its 10(b) defense because specific allegations in timely filed charges are sufficient to support the Pulido/Mendez allegation in the amended complaint. We affirm the judge's further finding that Pulido's statements in reaction to Mendez' wearing of a prounion T-shirt violated Section 8(a)(1). As further discussed in the next section of this opinion, we also agree with the judge that this unfair labor practice was a cause of an ensuing employee strike.

2. As indicated, the Pulido/Mendez unfair labor practice is central to the issue whether the judge correctly found that a strike begun by the Respondent's employees on July 28, 1998, was an unfair labor practice strike. The Respondent argues in exceptions that the strike was an economic strike. It contests the judge's finding that the employees relied on an unfair labor practice involving employee Valentin Mendez when they decided to strike. We find no merit in the exceptions.

Credited testimony shows that Mendez, a 17-year veteran in the Respondent's work force, arrived at work in early July wearing a new T-shirt bearing the insignia of the Union. This represented Mendez' first open display of support for the Union, which had been engaged in a lengthy campaign to organize the Respondent's employees. When Foreman Juan Pulido saw Mendez, he said that none of his workers had to use that kind of a shirt on the job. Mendez said that if Pulido did not like the shirt he should provide a uniform to wear. Pulido answered that Mendez did not have a job with him anymore because he did not want any of his team members wearing that kind of shirt. He continued that Mendez was not being fired, but he was being transferred to another foreman's crew. Job Superintendent Arturo Pulido and co-owner Dale Stewart both subsequently supported Foreman Pulido's action.

Credited employee witness testimony further shows that the Pulido/Mendez incident was the subject of concerned discussion among employees at ensuing prestrike meetings. Some employees even believed, mistakenly, that the Respondent had fired Mendez. According to the credited testimony of employee witness Cristobal Corona, he and others discussed what might happen to those with lesser seniority in light of the Respondent's retaliation against a veteran employee for wearing a union T-shirt.

The judge found, and we agree, that Pulido's treatment of Mendez was an unfair labor practice.[7] He further found that this unfair labor practice was a cause of the strike begun on July 28. As factors supporting this finding, the judge cited the aforementioned employee discussions, as well as the direct effect of the Respondent's action on Mendez, who joined the strike; the Union's unfair labor practice strike notice to the Respondent; and the unfair labor practice strike language of most picket signs displayed during the strike.

In exceptions, the Respondent contends, inter alia, that the Union and striking employees were concerned only about economic issues and about employment actions that have not been found to be unfair labor practices.[8] It further contends that the Pulido/Mendez incident, even if it did entail an unfair labor practice, was insufficient to cause a strike.

[7] The judge relied in part on credited testimony that another employee, Armando Rangel, was sent home from work after wearing the same type of new T-shirt as worn by Mendez. The judge observed, in passing, that the Respondent's officials seemed oddly to object only to clean T-shirts, while permitting other employees to wear dirty union T-shirts. The record suggests, however, that these officials were reacting to the fresh declarations of union support symbolized by the wearing of the new T-shirts, rather than to the relative cleanliness of those T-shirts.

[8] These actions were the subject of unfair labor practice allegations that were settled, withdrawn, or dismissed prior to issuance of the complaint, or dismissed by the judge. We note that there are no exceptions to the judge's recommended dismissals.

The test for determining whether a strike is an unfair labor strike is whether it is caused "in whole or in part" by an unfair labor practice. *Citizens National Bank of Willmar*, 245 NLRB 389, 391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981).

> In determining whether a strike is an unfair labor practice strike, the Board does not calculate the relative severity of the unfair labor practices, but instead considers only whether the strike was at least in part the direct result of the employer's unfair labor practice, *C&E Stores*, 221 NLRB 1321, 1322 (1976); and whether the employer's unlawful conduct played a part in the decision to strike, *Central Management Co.*, 314 NLRB 763, 768 (1994).[9]

In light of this clear and controlling precedent, the Respondent's argument that the Pulido/Mendez unfair labor practice was not sufficient to cause a strike is without legal merit. The factors cited by the judge support his finding that this unlawful action was *a* cause of the strike. Nothing more is required under the Board's causation test. It was not necessary for the General Counsel to show that the unfair labor practice was of a particular level of severity or that it was a major or predominant factor in the employees' decision to strike.

Moreover, it is irrelevant that some of the employees concerned about Pulido's treatment of Mendez may have mistakenly perceived the unfair labor practice as a discharge. "It is the fact that the employees were motivated by Respondent's unlawful conduct that is determinative. . . . It is not required that they correctly perceive the unlawful nature of the Employer's actions." *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995), enfd. 89 F.3d 692 (10th Cir. 1996), citing *F. L. Thorpe*, 315 NLRB 147, 150 fn. 8 (1994), enf. denied in part 71 F.3d 282 (8th Cir. 1995).

We therefore affirm the judge's finding that the strike was an unfair labor practice strike. We also affirm the related finding that the Respondent unlawfully refused to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work.

ORDER

The National Labor Relations Board adopts the recommended Order and amended Order of the administrative law judge, as modified below, and orders that the Respondent, Precision Concrete, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order and amended Order as modified.

[9] *Boydston Electric*, 331 NLRB No. 194, slip op. at 3 (2000).

1. Substitute the following for paragraph 2(a) of the recommended Order and 2(b) of the amended Order and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer all of the unfair labor practice strikers, listed below, full reinstatement to their former job or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Last Name	*First Name, M.I.*
1. Arteaga	Gumaro
2. Candelaria	Ronnie
3. Carra	Cesareo
4. Cobarrumias	Jesus
5. Flores	Luis
6. Gomez	Carlos
7. Gonzales	Francisco
8. Gonzales	Luis
9. Guerrero	Vicente
10. Gutierrez	Arnulfo
11. Gutierrez	Jose
12. Hernandez	Jose A.
13. Jimenez	Alfredo
14. Martinez	Abel
15. Martinez	Jorge H.
16. Mendez	Juan C.
17. Mercado	Carlos
18. Mercado	Gerado
19. Montano	Heriberto
20. Nava	German
21. Orellana	Luis A.
22. Peregrino	Nicholas
23. Pimentel	Felipe
24. Ramirez	Amador
25. Ramirez	Joel
26. Rangel	Armando
27. Reyes	Guerrero
28. Rojas	Joel
29. Rueda	Juan C.
30. Santana	Ramon
31. Santana	Victor
32. Terriquez	Manual
33. Vargas	Ramon
34. Vazquez	Melchor
35. Verdeja	Abel
36. Verdusco	Joaquin
37. Zermeno	Hector

"(b) Within 14 days from the date of this Order, offer all of the unfair labor practice strikers who unconditionally offered to return to work by letter from the Union on

January 13, 1999, listed below, full reinstatement to their former job or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

1. Alvares	Juan Manuel
2. Anchondo	Carlos
3. Arias	Cuauhctemoc
4. Cano	Mario
5. Chavez	Joel
6. Cruz	Manuel
7. Curiel	Isalas
8. Curiel	Santos
9. Del Rio	Rodolfo
10. Delgado	Hilario
11. Diaz	Rufino E.
12. Fileto	Luis S.
13. Gomez	Arturo
14. Gomez	Clemente
15. Gomez	Jose A.
16. Gonzalez	Fabian
17. Hernandez	Raul
18. Horia	Joaquin
19. Ibarra	Francisco
20. Leon	Manuel
21. Maldonado	Antonio
22. Martinez	Gabino
23. Mendez	Valentin
24. Meza	Eduardo
25. Meza Rios	Eduardo
26. Michel	Jaime
27. Michel	Sergio
28. Moreno	Sergio
29. Padilla	Jaime
30. Parra	Leopoldo
31. Perez	Javier
32. Ponce	Marco A.
33. Quinones	Eduardo
34. Ramirez	Jose
35. Rangel	Alberto T.
36. Salazar	Donato
37. Sanchez	Adrian

"(c) Make the above lists of employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the following for relettered paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 20, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring in part and dissenting in part.

I agree with my colleagues except in two respects. First, for the reasons stated by the judge, I agree with his finding that the Respondent's foremen are statutory supervisors. Although I further agree with the judge and the majority that the foremen are also agents of the Respondent, which is bound by their conduct, I do not adopt the majority's reliance on *Cooper Hand Tools*, 328 NLRB 145 (1999). I dissented in *Cooper Hand Tools* on the agency issue.

Second, while I agree with the judge and my colleagues that the July 1998 conduct of Supervisor Pulido toward employee Mendez (threatening him with discharge and transferring him for wearing a union T-shirt) is not time-barred under Section 10(b) of the Act, I disavow my colleagues reliance (in fn. 5) on *Ross Stores*, 329 NLRB 573 (1999). I dissented in *Ross Stores* on the 10(b) issue, and I agree with the D.C. Circuit's analysis in that case.[1]

Although I reject their reliance on *Ross Stores*, I agree with my colleagues that Pulido's conduct toward Mendez is "closely related" to a timely filed charge within the meaning of *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).[2]

[1] I do note, however, that this case is factually distinguishable from *Ross Stores*. In *Ross Stores*, otherwise untimely 8(a)(1) allegations were sought to be added to a timely filed 8(a)(3) charge, and the two sets of conduct did not arise from the same factual circumstance.

[2] Under *Redd-I*, the Board examines three factors to determine whether an otherwise untimely allegation is closely related to a timely allegation. The Board first examines whether the untimely allegation involves the same legal theory as the timely allegation. Second, the Board looks at whether the timely and untimely allegations arise from the same factual circumstances or sequences of events. Finally, the

Concededly, an allegation regarding Pulido's conduct toward Mendez was never expressly raised in a timely unfair labor practice charge, and was not added to the complaint until March 1999 (at trial), more than 6 months after the events.[3] However, the Pulido-Mendez incident was closely related to allegations in an amended charge on March 20, 1998 that Respondent "threatened [employees] with unspecified reprisals." These allegations and the Pulido-Mendez incident both involve 8(a)(1) conduct. In addition, both arise out of the Respondent's reaction to the same organizational campaign. Finally, the defenses to both would be similar, i.e., the Respondent would deny the alleged conduct on credibility grounds, deny that the perpetrators of the threats were supervisors or its agents, or argue that the alleged conduct did not interfere with employees' Section 7 rights.

Accordingly, I agree with the judge and my colleagues that Pulido's conduct toward Mendez was "closely related" to a timely filed charge and, thus violated Section 8(a)(1) of the Act.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow employees to wear union T-shirts or other union insignia while working.

WE WILL NOT threaten employees with plant closure if they continue their union activities.

WE WILL NOT tell employees it would be futile to seek union representation.

WE WILL NOT tell an employee he should retire rather than continue to strike.

WE WILL NOT threaten a striking employees that we will call the Immigration and Naturalization Service if the employee continues the strike.

WE WILL NOT discriminate against unfair labor practice strikers by failing and refusing to immediately reinstate them, to their former positions on the Union's unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer all the below listed unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

1. Arteaga	Gumaro
2. Candelaria	Ronnie
3. Carra	Cesareo
4. Cobarrumias	Jesus
5. Flores	Luis
6. Gomez	Carlos
7. Gonzales	Francisco
8. Gonzales	Luis
9. Guerrero	Vicente
10. Gutierrez	Arnulfo
11. Gutierrez	Jose
12. Hernandez	Jose A.
13. Jimenez	Alfredo
14. Martinez	Abel
15. Martinez	Jorge H.
16. Mendez	Juan C.
17. Mercado	Carlos
18. Mercado	Gerado
19. Montano	Heriberto
20. Nava	German
21. Orellana	Luis A.
22. Peregrino	Nicholas
23. Pimentel	Felipe
24. Ramirez	Amador
25. Ramirez	Joel
26. Rangel	Armando
27. Reyes	Guerrero
28. Rojas	Joel
29. Rueda	Juan C.

Board considers whether a respondent would raise the same or similar defenses as to both the timely and untimely allegations.

[3] There was an additional 8(a)(1) violation found involving the July 1998 conduct of Supervisor McDevitt sending employee Rangel home for wearing a union T-shirt. The Respondent did not raise a 10(b) defense as to this violation (which is not one of the violations relied on by the Union and employees when commencing their unfair labor practice strike).

30.	Santana	Ramon
31.	Santana	Victor
32.	Terriquez	Manual
33.	Vargas	Ramon
34.	Vazquez	Melchor
35.	Verdeja	Abel
36.	Verdusco	Joaquin
37.	Zermeno	Hector

WE WILL also offer all the below listed unfair labor practice strikers, who unconditionally offered to return to work, subsequent to those listed above, immediate and full reinstatement to their former jobs:

1.	Alvares	Juan Manuel
2.	Anchondo	Carlos
3.	Arias	Cuauhctemoc
4.	Cano	Mario
5.	Chavez	Joel
6.	Cruz	Manuel
7.	Curiel	Isalas
8.	Curiel	Santos
9.	Del Rio	Rodolfo
10.	Delgado	Hilario
11.	Diaz	Rufino E.
12.	Fileto	Luis S.
13.	Gomez	Arturo
14.	Gomez	Clemente
15.	Gomez	Jose A.
16.	Gonzalez	Fabian
17.	Hernandez	Raul
18.	Horia	Joaquin
19.	Ibarra	Francisco
20.	Leon	Manuel
21.	Maldonado	Antonio
22.	Martinez	Gabino
23.	Mendez	Valentin
24.	Meza	Eduardo
25.	Meza Rios	Eduardo
26.	Michel	Jaime
27.	Michel	Sergio
28.	Moreno	Sergio
29.	Padilla	Jaime
30.	Parra	Leopoldo
31.	Perez	Javier
32.	Ponce	Marco A.
33.	Quinones	Eduardo
34.	Ramirez	Jose
35.	Rangel	Alberto T.
36.	Salazar	Donato
37.	Sanchez	Adrian

WE WILL make the above lists of employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

PRECISION CONCRETE

Richard C. Fiol, Esq., for the General Counsel.
Gregg Tucek (at hearing) and *Gerald Morales* and *Drew Metcalf, Esqs.* (on brief), of Phoenix, Arizona, for the Respondent.
Timothy Sears, Esq., of San Francisco, California, for Building Trades Organizing Project and *Daniel M. Shanley, Esq.*, of Los Angeles, California, for the Carpenter's Union.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Las Vegas, Nevada, on March 9–12 and March 23–25, 1999,[1] pursuant to an amended consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on October 30, and which is based upon charges filed by Building Trades Operating Project (BTOP) on behalf of Southern California-Nevada Regional Council of Carpenters, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL–CIO (Carpenters) and Operative Plasters' and Cement Masons' International Association, Local 797 (Cement Masons), and Laborers' International Union of North America, Local 827 (Laborers) (collectively the Union) on February 2, and March 20 (original and amended Case 28–CA–14982), on September 11 and October 30 (original and amended Case 28–CA–15431), and on September 17 and October 30 (original and amended Case 28–CA–15431–2). The complaint alleges that Precision Concrete (Respondent) has engaged in certain violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

Issues

I. Whether for all times material to this case, certain of Respondent's foremen listed at paragraph 4 of the amended consolidated complaint are statutory supervisors and/or agents.

II. If the foremen are statutory supervisors or agents, did they or other admitted supervisors, commit certain violations of the Act involving the making of threats, interrogations, or other coercive statements involving union activities for which Respondent is responsible.

III. Did Respondent isolate one or more employees due to their prior union activities, or because they gave testimony in prior Board proceedings, and/or fail and refuse to promptly reinstate another employee?

IV. Did certain of Respondent's employees engage in an unfair labor strike, and was the Union's subsequent offer to return to work unconditional?

V. During the strike, did certain strikers engage in misconduct serious enough to warrant their dismissal?

VI. Did Respondent unlawfully deny work opportunities to two of its employees?

[1] All dates refer to 1998 unless otherwise indicated.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and Respondent.[2]

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Nevada corporation engaged in the construction business building concrete and grading projects and having an office and principal place of business located in Las Vegas, Nevada. Respondent further admits that during the past year ending February 2, in the course and conduct of its business, it has purchased and received at Respondent's facility goods and materials valued in excess of $50,000 directly from points outside the State of Nevada. It further admits that for the same period of time, Respondent in the course and conduct of its business operations, described above, received gross revenues in excess of $500,000. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that BTOP, Carpenters, Cement Masons, and Laborers are all labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR ORGANIZATIONS

A. Facts

1. Background

This is a case arising out of a bitter and protracted labor dispute whereby the Union is attempting to organize Respondent's employees.[3] Issues to be decided include the status of Respondent's foremen, and depending on that status, statements or acts that may have been made or committed subsequent to a strike which began on July 28. Like the foremen, the status or character of the strike is in issue. Events in and around the picket line are of concern as is the Union's offer to return to work on September 3, either conditionally or unconditionally.

In January 1997, the Union's organizing campaign began and on July 30, 1997, the General Counsel issued the first complaint against Respondent (Cases 28–CA–14404 and 28–CA–14504; GC Exh. 3(a)). Subsequently, a second consolidated complaint issued on October 3, 1997 (Cases 28–CA–14404, 28–CA–14504, 28–CA–14656, and 28–CA–14689; GC Exh. 3(c)). Eventually the case was settled and employee Alfredo Silva, a witness for the General Counsel in the present case, returned to work pursuant to the settlement agreement. Silva's treatment by Respondent upon his return is an issue here. In addition, Respondent allegedly changed the status of its foremen from statutory supervisors to employees or leadmen, as a result of the settlement agreement. The agreement is not in the record of this case and other than as stated it plays no role here.

a. The CB cases

On November 30, the Regional Director issued an order further consolidating cases, second consolidated complaint and notice of hearing in Case 28–CB–-4974, et al. (Exh. A to R. Br.). On January 11, 1999, Respondent filed a motion to consolidate the above CB cases, which generally allege unlawful strike and picketing conduct by four separate labor organizations (the Union) with another CB case, Case 28–CB–4887, which deals with an alleged hiring hall violation in connection with certain referrals and has little or no relevance to any issue in the present case (GC Exh. 1(u)). On March 4, 1999, after considering the written positions of the parties. Associate Chief Administrative Law Judge William Schmidt denied Respondent's motion (GC Exh. 1(a)(1).[4] Judge Schmidt's order was based on the fact that the Regional Director had approved the informal settlement agreement in the CB cases, presumably over objection of Charging Party Precision Concrete, Respondent herein, and the resulting mootness.[5]

Thereafter, Respondent appealed the denial of its motion to consolidate to the office of the General Counsel and on May 26, 1999, the appeal was denied. Respondent also sought from the Board, permission to appeal from the ruling of the administrative law judge denying Respondent's motion to consolidate. On April 2, 1999, that motion too was denied.

Meanwhile, while these two appeals were pending, the instant case commenced and was completed. During the case, whenever a particular witness called by the General Counsel had provided affidavits in any CB case referred to above, the General Counsel tendered the affidavits to me for in-camera review. In some cases, I found relevancy and turned the affida-

[2] Initially, briefs in this case were due on or before May 1, 1999, and at the time the date was established, I specifically stated for the record the address for the division of judges in San Francisco where the briefs were to be sent (Tr. p. 1371). Thereafter, Respondent filed a motion to the division at the proper address for an extension of time to June 1, which motion was granted on March 31. In light of this background, it is difficult to understand how the "undetected clerical error" referred to in Respondent's June 16 Motion to Accept Precision Concrete's Post-Hearing Brief, could have occurred whereby Respondent's brief was allegedly sent to me, care of the NLRB Las Vegas office. Respondent states in its motion that it is "undisputed that Precision's brief was timely filed," and a FedEx receipt is appended to the motion showing shipment of the brief to the Las Vegas NLRB office on June 1. No proof of delivery appears to be included with Respondent's motion and I never received it. Notwithstanding Respondent's unexplained clerical error and its rather unsatisfactory motion, without objection by any party, I grant the motion.

[3] The employees concerned included carpenters, cement masons, cement patchers, laborers, truckdrivers, and equipment operators.

[4] The motion to consolidate the CB hiring hall case, Case 28–CB–4887, had been denied by Judge Schmidt on February 23, 1999, on the grounds that the matter appears entirely unrelated to the CA and all other CB cases (GC Exh. 1(a)(e), p. 3).

[5] In his Order, p. 2, Judge Schmidt observed that the CB settlement cannot preclude Respondent from offering relevant evidence in its defense, even evidence that may have also been relevant in the CB cases.

vit over to Respondent's counsel and in other cases, I found no relevancy and did not turn over the affidavit.

b. Settlement negotiations

On February 18, 1999, Respondent filed a motion for assignment of settlement judge (GC Exh. 1(a)(d)), which motion was granted on February 24 (GC Exh. 1(a)(f)). This then led to Respondent's motion to postpone the March 2, 1999 hearing date (GC Exh. 1(a)(g)), which again was granted (GC Exh. 1(a)(h)) and the case was set over for 1 week (GC Exh. 1(a)(i)). On March 4, 1999, Respondent filed a second motion to postpone hearing (Request for Oral Argument) (GC Exh. 1(a)(k)), which motion was denied (GC Exh. 1(a)(l)).

The associate chief administrative law judge assigned not one but two settlement judges (three if I am counted). The first settlement judge met with the parties on Friday, February 26, 1999, and made sufficient progress to convince the associate chief administrative law judge to assign a second settlement judge to meet with the parties early the following week (the first judge was unavailable due to a resumption of a prior case). Respondent's lead counsel did not appear to meet with the second judge, though he had been expected. In any event no settlement occurred.

On my arrival on Tuesday, March 9, without objection by any party, and again in the absence of lead respondent counsel, I met separately with the parties. Based on the positions conveyed to me privately by the parties, I concluded that settlement had never been possible and I now question the good faith of Respondent in asking for a settlement judge and in participating in settlement negotiations with three separate judges.[6]

c. Cultural/language gaps

Most of Respondent's employees are Spanish-speaking with varying amounts of English comprehension. Those of Respondent's foremen with Hispanic surnames are bilingual. All or most employees who testified needed an interpreter. With one or two exceptions, the union organizers involved in this case are bilingual. The primary organizer, Efrem Hernandez, is most comfortable in Spanish and elected to testify through the interpreter. The owners of the Company and the union official in charge of the campaign, Jim Sala, are English-speaking. The cultural and language divisions in this case, while not unique, are substantial and certain issues in the case are directly related to the employees' status as U.S. citizens, legal immigrants, or illegal immigrants.

2. Employer

Respondent is owned by three brothers: (1) Chad Stewart (inside) who runs the bidding, clerical, payroll, employee relations, and other related functions of the business from Respondent's facility. Chad Stewart testified both as an adverse witness for the General Counsel and as Respondent's witness; (2) Larry and Dale Stewart (outside) who run the various concurrent construction projects which usually number 10–12 jobsites in progress in and around the greater Las Vegas area. In performing their duties, Larry and Dale Stewart are assisted by Arturo Pulido, Respondent's project superintendent. Both Dale Stewart and Pulido testified as Respondent's witnesses. All three brothers and Pulido are admitted to be statutory supervisors for all times material to this case. As of July, Respondent employed approximately 15 foremen who work with groups of employees divided into crews. These foremen are assigned to various worksites operated by Respondent.

The foremen work with and supervise employees who perform work as carpenters, cement workers, laborers, truckdrivers, and equipment operators. Respondent's employees come and go at a rate higher than other businesses. As already noted, all or most nonforemen employees are Spanish-speaking and many of these employees are related by blood or marriage. For example, alleged discriminatee, Valentine Mendez has both a son (General Counsel's witness) and a son-in-law (Respondent's witness) employed by Respondent.

The nature of Respondent's business with several projects in progress at the same time and the extremes of Las Vegas weather, particularly during the summer months, require flexibility by all concerned. For example, during the hottest months where cement must be poured, a pour crew might begin work at midnight and work for 8–10 hours. When work is performed during the day in summer, workers on jobsites are provided water in 10 gallon jugs, which sometimes runs out. Certain issues are presented here whereby the Union is involved with offers of water replacement.

3. Strike

On July 28, the Union called a strike in which about 100 of Respondent's employees initially joined. Many employees crossed the picket line and returned to work before the strike was over. Respondent appeared to have no problem finding permanent replacements and about 40 were hired in all classifications. On September 3, the Union offered to return to work and based on one or more letters from the Union to Respondent in early September, where the subject was an end to the strike, an issue is presented as to whether the Union's offer was an unconditional offer to return to work. Other issues surround the strike as well, such as whether it is an economic or unfair labor practice strike.

B. Analysis and Conclusions

1. The General Counsel's amendments to complaint

Prior to hearing,[7] the General Counsel was granted permission to amend the complaint over the objection of Respondent that the amendments violated Section 10(b) of the Act. I indicated that I would consider the statute of limitations question with the briefs (Tr. 13), the amendments in question allege that employees Juan Mendez, Jorge Martinez, and Heriberto Montano were isolated on the job, that employees Armando Rangel and Javier Perez were denied work opportunities and

[6] In my opinion, neither Rule 408 of Fed.R.Evid., which generally bars evidence of conduct or statements made in compromise negotiations to prove or refute any issue at trial, nor Sec. 102.35(b)(4) of the Board's Rules and Regulations which generally bars evidence of conduct or statements of the parties in proceedings before the settlement judge, prohibits my questioning of Respondent's good faith.

[7] Respondent was given notice of the motion to amend by letter of February 24, 1999.

that Foremen Carlos Rosales and Juan Pulido made certain illegal statements and threats to employees.

A statute of limitations defense is an affirmative defense and the initial burden of proceeding with an affirmative defense rests with Respondent. *Silver State Disposal Service*, 326 NLRB 84, 85 (1998). I find here that Respondent has failed to meet its burden of proof. I begin with *Burlington Times, Inc.*, 328 NLRB 504, 505 (1999), citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), where the Board instructed that any amendment of the complaint must be closely related to an allegation contained in a timely filed charge. As further contained within *Redd-I, Inc.*, the Board looks to (1) whether the new allegations involve the same legal theory as the allegations in the charge, (2) whether the allegations arise from the same factual situation or sequence of events as the allegations in the charge, and (3) whether a Respondent would raise the same or similar defense to both allegations.

Under the test recited above, I have little difficulty in finding that the amendments to the complaint were closely related to allegations in the timely filed charge. As Respondent concedes, the original allegations in Case 28–CA–14982 (filed February 2, amended March 20) were incidents of isolating employees and a single incident of refusal to hire an employee (GC Exhs. 1(a) and (c)). Respondent's attempt to carve out the instant case from the governing precedent (Br. 14), because subsequent incidents involve different employees with different foremen at different times with different crews at different locations, is lacking in merit. The fact is, contrary to Respondent's assertion, there is a logical connection. That is, subsequent amendments were part of a pattern of conduct by Respondent aimed at impeding the Union's organizing activities. Moreover, Respondent's defense is the same, that its foremen are not its agents or didn't do or say what is attributed to them.

During the hearing, the General Counsel moved to dismiss all the Luis Fileto allegations and the allegations involving Martinez. These deletions do not affect the validity of the General Counsel's remaining amendments which Respondent seeks to challenge.

I find that the amendments are closely related to the original charge and are predicated on the same legal theory. *Epic Security Corp.*, 325 NLRB 772, 775 fn. 13 (1998), citing *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989).

2. Foremen as statutory supervisors and/or Respondent's agents

Much cumulative, repetitive and conflicting evidence was offered by the parties on the question of whether Respondent's foremen are currently statutory supervisors. General Counsel and the Union contend the foremen are statutory supervisors and/or agents of Respondent, while Respondent denies it.

As a general rule, the parties seeking to prove that certain employees are statutory supervisors has the burden of proof. *Northwest Florida Legal Services*, 320 NLRB 92 fn. 1 (1995). Here it is undisputed that prior to May, 1997, the foremen had the power to hire and fire employees and could perform other supervisory tasks in the interest of the employer. Accordingly, all agree that foremen were once statutory supervisors.

In *Bordo Products Co.*, 117 NLRB 313, 314 (1957), the Board stated the familiar presumption that a state of affairs, once shown to exist, continues until the contrary is shown. (Citations omitted.) Because it is undisputed that the foremen were once statutory supervisors, General Counsel may rely on this presumption to meet its burden of proof, thereby requiring Respondent to prove that the foremen had ceased to be statutory supervisors during the events in question in this case.

According to Respondent, certain unfair labor practices charged to Respondent in a prior case were committed or may have been committed by its foremen then admittedly statutory supervisors. To avoid liability for any future unlawful acts committed by its foremen, Respondent purported to strip its foremen of all authority as statutory supervisors. This process allegedly occurred in two steps: (1) In May 1997, Respondent held a meeting with its foremen and told them that henceforth they could not hire nor fire employees nor discipline nor give raises nor presumably perform any other acts which might indicate the foremen continued to be statutory supervisors; (2) On October 16, 1997, Respondent sent a memo to its foremen which reads as follows:

> TO: All Foremen
>
> SUBJECT: Hiring & Firing Practices
>
> Effective immediately precision Concrete foremen will not have the authority to hire and fire employees. All employment decisions, such as transfers, reassignments etc. must be approved by the general superintendent. All hiring and firing decision will be made by corporate officers and the general superintendent Arturo Pulido. Foremen are expected to provide recommendations for employment decisions and evaluations of workers under their direction and to determine manpower requirements on their crews. This information is to be provided to Larry Stewart, Dale Stewart and Arturo Pulido.
>
> Thank you,
>
> Chad Stewart
>
> [CP BTOP Exh. 2.]

The reader might ask why the five month gap between the May meeting and the October memo. The record contains no credible explanation. However, certain surrounding facts and circumstances can be considered. For example, although foremen supposedly lost a great deal of authority and responsibility, no foremen suffered a reduction in pay and they continued through 1998 to be the highest paid hourly employees. Moreover in 1998, Respondent continued its practice of several years vintage of awarding foremen a bonus during the Christmas season. This bonus was based on the profits of Respondent and was computed by the three owners with the advice of Arturo Pulido. Not all foremen received the same bonus, and amounts awarded in 1998 ranged from $1000 to several thousand dollars. In addition to foremen, Pulido received a bonus as did one of the two truckdrivers and one of five equipment operators.

The October memo recited above was supposed to have been distributed to all nonforemen with their pay in October. While there is no evidence that the memo was ever printed in Spanish,

there is evidence that some of Respondent's employees apparently did receive it, generally those employees who crossed the picket line and went back to work early. Those who supported the strike for the duration did not receive a copy of the memo and were unaware of its contents. The former group testified for Respondent and the latter for the General Counsel.[8]

Only foremen carried a radio and telephone and drove a company truck both before and after the alleged change in their duties. Others who had the same possessions were the admitted supervisors, the Stewart brothers and Pulido. Both before and after the change, foremen worked with and supervised a crew of employees, the number of which could range from 3 up to 20 depending on the job and work to be done. The crews were generally arranged along classifications, for example a crew of carpenters, pour crew (cement), etc. During 1998, Respondent's hourly nonforemen employees numbered about 150 to 160 employees.

Both before and after the change of duties, foremen keep time for members of their crew and signoff weekly on employees' timecards. They continue to assign work daily and are responsible for the quality of the crew's work and for completion of the work on time, matters which are directly related to company profits and the resulting bonuses.. The foremen use their trucks to ensure that a jobsite has sufficient materials for the work to be performed.

As to working with the tools, General Counsel's witnesses have the foremen working 1–2 hours per day at most, while Respondent's witnesses have the foremen working with the tools most of the time. I find that working with the tools varies, but that each foremen does some work daily. All witnesses agree that when the strike began and after, not a single foreman went out with the approximately 100 or so initial strikers.

In September 1997, after the foremen's duties were allegedly changed, all or most were given a short course (1–2 hours) in OSHA safety procedures and on completion received a certificate of completion. On return to the jobsite, foremen were expected to and did implement the newly acquired safety skills.

I find that Respondent has failed to rebut the presumption that its foremen continued to perform duties of and remained statutory supervisors. First, the failure to inform all employees of this alleged change means that so far as these employees were concerned nothing had changed. Moreover, the alleged change itself was accompanied with a "wink and nod" so that Respondent could have it both ways. The foremen would continue to perform duties much as before, receiving the same pay and bonus, just as Respondent wanted it, while if the foremen made unlawful statements, Respondent could then be in the position of disavowing its foremen's supervisory status and avoiding responsibility. This scheme cannot be permitted to succeed.

To be sure some of the Respondent's duties are consistent with those of a leadman. However, in some cases, the foremen here have their own leadman. For example, General Counsel's witness Javier Perez worked with Foreman Jaime Cervantes who had a leadman named Francisco Ibarra. Dale Stewart testified that a foreman can recommend the hiring and firing of employees which he will accept depending on circumstances (Tr. 908–910). Stewart went on to testify that any employee can make these same recommendations. I find no evidence to support Dale Stewart's appraisal of foremen's power to recommend the hiring and firing as being merely equivalent to that of any other employee. Rather, I find that foremen have the power to effectively recommend the hire and fire of employees. *Queen Mary*, 317 NLRB 1303 (1995); *Brown Transport Corp.*, 296 NLRB 552, 553 fn. 10 (1989). Compare *Masterform Tool Co.*, 327 NLRB 327 (1999).[9]

Section 2(11) of the Act defines a statutory supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The power must be exercised with independent judgment on behalf of management and not in a routine manner. It is well settled however, that the statutory indicia quoted above are in the disjunctive and only one need exist to establish supervisory status of a particular individual. *DST Industries*, 310 NLRB 957, 958 (1993); and *Sunnyside Home Care Project, Inc.*, 308 NLRB 346, 347 (1992). Moreover, "individuals with statutory supervisory authority do not lose their status simply because they infrequently exercise their authority." *Opeika Foundry*, 281 NLRB 897, 899 (1986), and cases cited therein.

Foremen also continue to have the power on worksites to which they are assigned to discipline employees or to effectively recommend their discipline, by using independent judgment. Thus, I credit General Counsel's witness Armando Rangel who testified that in early July, he was sent home by Foreman Pat McDevitt in an incident over the wearing of a union T-shirt on the job. As McDevitt sent Rangel home, he complained that he had just given Rangel a raise in pay "and now you are doing this." (Rangel had received a raise of $2/hour about 2 months before.) General Counsel's witness Javier Perez testified how he and Rangel were sent home by Foreman Cervantes over an incident involving shortage of water on the worksite. Based on this incident, I find that Respondent has failed to prove that foremen did not continue to have the power to discipline. See *Sun Refining Co.*, 301 NLRB 642 fn. 2 649 (1991).

[8] Respondent drafted a Workplace Violence Policy early in 1997 (GC Exh. 46). There was also some sort of employee handbook in existence (not offered into evidence). Like the October 1997 policy on foremen's duties, these documents were kept in Respondent's office and not distributed to all employees. This curious nondistribution policy further enhances the role of the foremen who were the only employees with some knowledge of the policy.

[9] None of the Stewart brothers have the language skills, the time or desire to investigate applicants for employment. To suggest that all of this would be turned over to Pulido makes no sense since his time is also limited. Accordingly, it is logical to rely on the trusted foremen to effectively recommend new employees since if the foremen are wrong, their yearly bonus awards would be directly impacted.

At page 19, et seq. of its brief, Respondent argues that foremen are leadmen. I disagree and I find they are statutory supervisors. Respondent has failed to rebut the presumption that they continued assigning and inspecting work, transferring employees between workcrews and worksites, enforcing discipline, and performing other supervisory duties while exercising independent judgment during significant portions of their worktime. As statutory supervisors, foremen are presumed agents of Respondent which is responsible for the acts of the foremen. I now assume for the sake of argument only that Respondent has met its burden to prove that the foremen were effectively stripped of their statutory duties in 1997; I would nevertheless find that Respondent's foremen are its agents.

I begin my analysis with the recent case of *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), where the Board explained:

> . . . apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. [Citations omitted.] Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." [Citation omitted.]

Respondent's employees looked to the foremen for job assignments, breaks, and requests for time off. Many of the foremen were bilingual and relayed orders from the English-speaking [outside] Stewart brothers who visited jobsites only periodically and remained only for short periods of time before moving on the next jobsite. The Stewart brothers and Pulido had little if any contact with the Spanish-speaking employees. Accordingly, the foremen acted as conduits for relaying and enforcing Respondent's decisions, directions, policies, and views. See *Poly-America, Inc.*, 328 NLRB 667 (1999); *Great America Products*, 312 NLRB 962, 962–963 (1993); and *Cooper Hand Tools*, 328 NLRB 145 (1999).

Under Section 2(13) of the Act, the question whether specific acts performed by an agent were actually authorized or subsequently ratified is not controlling. Indeed, even if the agents' conduct is contrary to an employer's express instruction, the employer will be held responsible for that conduct if employees could reasonably believe that the acts were authorized. *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir. 1971).

Based on the above discussions, I find that for all times material to this case, the following foremen are and continue to be statutory supervisors and/or agents of Respondent: Fernando Benevidez, Andres Caja, Pat McDevitt, Emilo Pinal, Eduardo Pinal, Efrem Pinal, Terry Stewart, Carlos Rosales, David Escobar, Jaime Cervantes, Juan Pulido, and Kevin Walker. I further find that in light of their status, Respondent is responsible for any violations of the Act committed by the foreman, an issue to be discussed below.

3. Alleged unlawful isolation of employees

It is alleged here that three employees Alfredo Silva, Juan Mendez, and Heriberto Montano were isolated at the job sites and kept apart from their fellow employees in violation of the Act. Two recent cases deal with this type of allegation, *Epic Security Corp.*, 325 NLRB 772 (1998) (violation found based on employee's reassignment to a lone worksite thereby reducing his contacts with other employees), and *Cleveland Construction, Inc.*, 325 NLRB 1052 (1998) (violation not found based on single episode of four men being isolated in workplace as unit). To determine which of the precedents should govern these allegations, I turn to the record.

a. Alfredo Silva

It is undisputed that Silva began working for Respondent in 1995, was terminated and returned to work in January as a patcher, pursuant to a settlement agreement of a prior case. Pursuant to direction of his Foreman Caja, a Respondent's witness, Silva worked first at the Summerlin jobsite, where he was the only patcher. Respondent's carpenters, also working at Summerlin, took their break at different times. After 4 days, Silva reported to the jobsite at King & Cheyenne, where again he was the only patcher. After 6–7 days there, Silva was assigned to a jobsite at Sunset and Bally where again he was the only patcher. Here again Respondent's carpenters and concrete workers were about 250–300 feet away but on a different break schedule. A few days later, Silva was assigned to a jobsite across the street where, after the first day, he was finally joined by a coworker, but not one to his liking as Jose Bernal was a "compadre" of Caja and wouldn't listen to Silva talk about the Union. In February, Silva engaged in a short strike to protest his perceived unfair treatment. After a few days the strike ended, but Silva did not return to work.

In addition to Caja who denied any deliberate isolation of Silva, Respondent called Antonio Hernandez Garcia, a striker who returned to work after 5–6 days. Hernandez testified that he too works for Caja as a patcher and most of the time he works alone as "there's no necessity of being a whole bunch of us." (Tr. 13.) In addition to this testimony, Respondent offered Caja's logbook or work dairy showing many patchers work alone as indicated by the word "Solo" (R. Exh. 3). The General Counsel characterizes the exhibit as facially attractive, "but one that lacks merit based on the totality of the evidence," i.e., some patchers worked alone . . . for no more than a few days at a time (fn. 14 of GC Br.). However, the General Counsel forgets the testimony of his witness and alleged discriminatee Armando Rangel that he thought it was normal for patchers to work by themselves (Tr. 537).

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's adverse job action. *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). A prima facie case is made out where the General Counsel establishes protected activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has

the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

I assume without finding that the General Counsel has established a prima facie case. That is it is undisputed that Silva filed a charge in the earlier case and Respondent was aware of this. I also find that Respondent has animus against the Union. At this point I assume that a patcher working by himself on a construction site has been adversely treated. To be sure, I credit Silva that before his earlier termination, he worked with a crew all or most of the time. However, many employees would welcome an opportunity to work alone, particularly if one or more coworkers discussed subjects of little interest to the employee. In any event, I credit Respondent's evidence which rebuts any prima facie case that might have been established. Thus, I find that many patchers work alone on different jobs. To measure the rate of working alone by others compared to Silva is not helpful since Silva elected to leave his job after only three weeks. During this period, he worked with a companion for a few days. I find that Silva's period of reemployment was not adequate to make a meaningful comparison to other patchers. Finally, I am puzzled as to why Silva, who was not unduly shy, did not seek to change his breaktime to correspond with the breaks of carpenters and other Respondent employees working nearby. If he had done so and been refused without a good reason, this evidence might have changed a losing case to a winning one. Based on the evidence presented, I will recommend that this allegation be dismissed.

b. Juan Mendez

This General Counsel's witness had worked for Respondent for 10 years as a carpenter. In February, he joined Silva's ministrike for about 3 days during which time he picketed at the convention center worksite and then returned to work. On his return, Mendez was directed to join his Foreman Kevin Walker at a worksite at Paradise and Greer. Before Mendez went on strike, he had worked with a crew of 15 to 20 employees. After he returned to work in February, he worked with Walker and another guy up to just before the big strike began on July 28. I find no prima facie case established at this point for the mere change in size of a crew to the foreman and two others is not an adverse employment action. In addition, I must give some leeway to Respondent to manage its business without the NLRB looking over its shoulder.

Respondent discusses two additional issues with respect to Mendez, the alleged denial of overtime on his return to work form the ministrike and the alleged McDevitt threat for soliciting employees. I have searched the General Counsel's brief in vain for any discussions of these two issues and find none. So far as I am convinced these issues if they exist, are waived and I decline to address them. Cf. *Food & Commercial Workers Local 137 v. Food Employers Council*, 857 F.2d 519 fn. 2 (9th Cir. 1987); *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025–1026 (7th Cir. 1988); *Victoria Partners*, 327 NLRB 54, 63 (1998).

c. Heriberto Montano

Montano began working for Respondent 4-1/2 years ago, primarily performing carpentry work. Beginning in September 1997 to the last day he worked, Montano worked with a crew of employees which at one time or another apparently had three different foremen. Beginning in March, Montano worked for a company called Commercial, until the July 28 strike, at which time Montano apparently left Commercial and joined the strike against Respondent. After one week, Montano left the strike and applied for work with Respondent. In an employment interview with Dale Stewart, Montano was told by Stewart that the Company needed loyal people to work with him as the rest of his people had left. The witness was rehired and assigned to work at a site at Sunset and Escondido. Two weeks after he was rehired, Montano rejoined the strike. After the Union made an offer to return to work, Montano received a letter to return to work.

On Friday, October 23, Montano worked on the Sunset/Escondido jobsite performing carpentry work with Foreman Emilio Pinel, but no other employees. Pinel credibly testified that Montano never complained to him that he was forced to work alone. After being a no-call/no-show for Monday and Tuesday, October 26 and 27, Montano returned to work on Wednesday, October 28, where he worked 4-1/2 hours and then left the jobsite without explanation.

I will recommend that this allegation be dismissed. In agreement with Respondent (Br. 37), I find no reason for Respondent to have isolated Montano on the job after he returned from the strike. No other returning striker is alleged to have been similarly treated. As Respondent was returning strikers to work, it needed maximum flexibility particularly where the issue of permanent replacements had not been resolved.

4. Alleged denial of work opportunities to employees

The General Counsel called two witnesses in support of this allegation: Armando Rangel, a cement worker for 3 years with Respondent, and Javier Perez, a laborer for Respondent also for about 3 years. Both testified that in May or June on a hot day while both were working at the convention center, they asked two foremen, Cervantes and McDevitt, for water, but none was brought, so they said to the foremen they would ask the Union to provide water. At this point, McDevitt instructed Cervantes "to cut" i.e., to send both men home about 10:30 a.m. when there was still work to be done.

To rebut, Respondent called its two foremen, Cervantes and McDevitt. The former testified that when the water ran out, Perez asked for bottled water. Cervantes told him to buy his own bottled water and denied ever sending him home for those comments. Cervantes admitted sending both home in early July for evading work as they claimed to be working for McDevitt when Cervantes needed them on a cement pour and McDevitt told Cervantes he thought the two men were with him.

McDevitt testified he could not recall either Rangel or Perez asking for water or threatening to call the Union. However, he did corroborate Cervantes' account of sending the two men home for avoiding work when on a hot day, they told each foreman they were working for a period of time with the other.

Rather than crediting either account of this incident, I find that neither is more credible than the other. Accordingly, I find

no proof by a preponderance of the evidence and I will recommend that this allegation be dismissed.[10]

Rangel also described another incident of being sent home by McDevitt for wearing a union T-shirt. At the time of the incident, according to Rangel, McDevitt scolded, "I believed in you, I just gave you a raise and now you are doing this." The T-shirt in question had a union logo and the legend "Show me the money." Rangel was sent home about 1 p.m. after having began work at midnight (apparently the other workers continued working until 5 p.m.). The raise to which McDevitt referred was $2/hour which Rangel had received about 2 months before. Rangel was corroborated by Perez who testified he heard McDevitt's scolding as well as his order for Rangel to go home for wearing the T-shirt. McDevitt testified that many employees have worn union T-shirts and union hats as well, all without interference. He denied that he sent Rangel home for this reason.

In this case, I credit Rangel and Perez and I do not believe McDevitt. It is clear to me that Respondent's foremen had a problem with employees wearing union T-shirts. Oddly, this problem extended only to the wearing of clean T-shirts where the message was clearly visible. Both Rangel and Valentine Mendez testified that the wearing of dirty union T-shirts did not draw foremen's attention.

The Board has held[11] . . . that the Act protects the right of employees to wear union insignia while at work and absent "special circumstances," it violates Section 8(a)(1) for an employer to prohibit employees' wearing of such insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Respondent presents no special circumstances to justify sending Rangel home. Instead it argues on credibility grounds a position that I reject, that there was no reason for McDevitt to single out Rangel (Br. 41). While I decline Respondent's implied invitation to explain McDevitt's state of mind, I will refer the reader to Rangel's testimony on redirect examination:

> MR. SEARS: Q: The day that you put on the new t-shirt, did anyone else put on the same union t-shirt at the same time.
> A. None of the cement workers, only myself.
>
> [Tr. 543.]

I credit this testimony for the reasons stated above and find that Respondent has violated Section 8(a)(1) as alleged.

5. Alleged threat to employees by Carlos Rosales

For this allegation, the General Counsel presented the testimony of Melchor Vazquez, who worked for Foreman Carlos Rosales as a laborer in 1998. According to Vazquez, he was performing work at the Prima Donna jobsite when in the afternoon, union organizers showed up and he spoke to them while on break of 15 minutes. This happened on a Friday and the following Monday, Rosales held a meeting for about 5 minutes with about 10 employees present. Rosales told the assembled employee that he didn't like it that the employees talked to the organizers and he threatened to fire them.

Respondent called its Foreman Rosales to admit that the organizers showed up at the time and jobsite in question, but to deny that he held a subsequent meeting with employees and/or that he threatened to fire them.

At page 21 of his brief, the General Counsel makes the curious argument that I should discredit Rosales because after he lost another job in early 1998 allegedly due to union pressure, he filed charges against the Union for hiring hall violations. The General Counsel did not add in his brief, that his own office found merit to the charges, and if the case had not been settled—as it apparently has been—no doubt a different General Counsel would be urging a different administrative law judge that Rosales should be credited. In any event, I again find that neither Vazquez nor Rosales is more credible than the other. Moreover of the 10 employees who were supposedly at the meeting convened by Rosales, only one testified and Vazquez is not corroborated. Accordingly, I will recommend that this allegation be dismissed.

A second allegation involves these same two witnesses. In mid-July, according to Vazquez, different union organizers from those referred to above, came to a jobsite on Nellis Avenue where Vazquez was working. The organizers gave employees water after their break was over and Rosales told employees not to pay attention to them. Rosales admitted to the incident explaining in his testimony that he told employees they couldn't stop working, leave the jobsite and accept the water from the organizers. Since it is undisputed that employees were not on break at the time, I see no reason that organizers should be permitted to distribute water during worktime. This is no more than common sense and even if I credited Vazquez' testimony about the choice of words used by Rosales, an objective standard requires that employees would understand Rosales to mean, "Don't pay attention to them, while you are working." Cf. *Adco* Electric, 307 NLRB 1113 (1993), enfd. 6 F.3d 1110 (5th Cir. 1993). I will recommend this allegation be dismissed.

6. Alleged threats to discharge and transfer an employee for wearing a union T-shirt

Valentine Mendez is a longtime Respondent employee having begun to work in 1981. His son, Juan Mendez, also worked for Respondent for several years. Over the years, V. Mendez performed work as a carpenter, laborer, patcher, and other jobs. During 1998, he worked with a foreman named Juan Pulido. The General Counsel marks the day of the incident involving the wearing of a union T-shirt—same logo as described above in section B,4 of this decision, as July 10. However, V. Mendez first denied he wore the shirt before the July 28 strike (Tr. 189). Then he changed his testimony to say that he wore it before the strike, and had a problem with his foreman about it (Tr. 190). When Pulido saw V. Mendez wearing the shirt, he said none of his workers had to use that kind of shirt to the job. V. Mendez responded that if the foreman didn't like the shirt, he should provide V. Mendez with a uniform to wear. Pulido answered that V. Mendez didn't have a job there with him anymore because he didn't want any of his team members wearing that kind of shirt. Pulido continued that V. Mendez was not

[10] Cervantes' account of sending the two men home supports my finding above that foremen are statutory supervisors and McDevitt's awarding of a raise for Rangel (below) serves the same purpose.

[11] *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1045 (1994).

was not being fired, but was being transferred to Caja to work as a patcher. V. Mendez said he wouldn't do patching because Pulido didn't like the patch work he did. Pulido said he had to do this and in this respect he was backed by Arturo Pulido, job superintendent and by Dale Stewart, who came to the jobsite in response to Pulido's call.

Respondent portrayed the dispute as that of a reluctant employee who didn't want to patch. All of Respondent's witnesses, Juan Pulido, Dale Stewart, and Arturo Pulido, admitted that on the day in question in early July,[12] Valentine Mendez was wearing a union T-shirt. All testified that Valentine Mendez attempted to make an issue about the T-shirt to justify his reluctance to start patching. The original incident however involved only V. Mendez and Juan Pulido. According to the latter, prior to 9 a.m. when Pulido told him to report to Caja to patch, V. Mendez had been setting columns prefatory to pouring concrete. To support his assertion that V. Mendez' union T-shirt played no role in the decision to transfer, Pulido testified not only that several others had been wearing union T-shirts on the day in question—there being no reason to single out V. Mendez—but that Juan Pulido himself at the time of the incident had been wearing union stickers on his hardhat (Tr. 1068, 1080). He couldn't provide any details about when or from whom he received these stickers, and no other witness claims to have seen Pulido wearing union stickers on his hardhat, I find his testimony preposterous. Given Respondent's history of animus towards the Union, I don't believe that a foreman who received a discretionary Christmas 1998 bonus of $3500 would wear a union sticker on the job. I credit V. Mendez' account of the incident since another T-shirt incident found above tends to corroborate V. Mendez' testimony and since Juan Pulido is not credible and neither Respondent witness Dale Stewart nor Arturo Pulido is sufficient to turn this allegation into Respondent's favor. As before, since there is no issue regarding special circumstances, I find on credibility grounds that the violation has been proven. See *Mauka, Inc.*, 327 NLRB 803 (1999).

7. Alleged unlawful statements and threats of Chad Stewart

The strike in issue began on July 28 and certain issues arising out of the strike will be considered below. The allegation to be considered here is alleged to have happened on August 6, about 1-1/2 weeks into the strike. Testifying for the General Counsel, Union Organizer Leonard Taylor recounted an incident occurring at a local Costco where, by coincidence, he encountered Chad Stewart about 10:30 a.m. Another organizer named Mark Sheehan was with Taylor, but he did not testify. According to Taylor, he initiated a conversation by asking Chad Stewart to sit down with the Union and talk about the issues. Chad Stewart declined saying he had no fucking use for the Union and was making the Company get smaller because the Union was causing a loss of business, and eventually he'd close the doors, and would never sign with the Union. This message was repeated by Taylor to strikers at the next union meeting, a few days hence, through the translating services of Union Organizer and General Counsel witness Roy Granillo, who is bilingual.

According to Chad Stewart, there were two conversations at different times with Taylor at Costco. He addressed one which supposedly occurred on August 15: Taylor began by saying we know you guys aren't able to service your jobs. Stewart denied this saying, "No, actually we're up to speed on the jobs, and we're not behind schedule." Then Taylor referred to certain unfair labor charges—original charges had been filed in February—and when Stewart asked for specific examples of the ULPs, the best Taylor could come up with was failure to provide water and payment of substantial wages.

At page 50 of its brief, Respondent asks me to consider the unexplained absence of Mark Sheehan in resolving credibility issues. I do so, but nonetheless credit Taylor on this point. First, I note that Granillo testified that he translated Taylor's account of the incident at a union meeting shortly after the incident. I can't believe that Taylor would fabricate a story to be related to strikers. Next, I note that Stewart has a short fuse when he feels provoked. For example, he admitted using profane language directed toward union representatives who were stationed outside his gated residential community.

I agree with the General Counsel (Br. 36) that it was reasonably foreseeable for Stewart to know and perhaps expect that during the strike, Taylor would relate Stewart's remarks to striking employees which he did. Respondent does not challenge the allegation on the grounds that Taylor is not an employee of Respondent. Nor does Respondent raise an issue regarding the translating ability of Granillo who frequently acts in the capacity of interpreter. With these two preliminary issues disposed of, it is not difficult to find a violation since Stewart's remarks were coercive and outside the bounds of any lawful 8(c) protected statement. Threats of plant closure or futility of seeking union representation are violative of Section 8(a)(1) of the Act and I so find. See *Gissel Packing Co.*, 395 US 575, 711 fn. 31 (1969); *Almet, Inc.*, 305 NLRB 626, 626–627 (1991); *T&J Trucking Co.*, 316 NLRB 771, 778–779 (1995); *Portsmouth Ambulance Service*, 323 NLRB 311, 319 (1997).

The General Counsel raises another issue regarding Chad Stewart's remarks to union representatives outside the gated confines of his neighborhood. This issue requires certain background which is essentially undisputed. On or about August 25, Mario Vergara, a union representative from Southern California, led a group of four strikers to Chad Stewart's neighborhood to picket. On finding an automatic gate blocking access into the neighborhood, they simply milled around outside from about 6 to 8 or 8:30 a.m. Although the Union created and has used a few picket signs with a picture of Chad Stewart on a "wanted" poster, Vergara testified as General Counsel's witness that no such picket signs were with the union representatives on the day in question. In fact the conventionial picket signs indicating unfair labor practice strike remained in their van. About 8 a.m., Chad Stewart came through the gate, exited his vehicle and confronted Vergara with profanity. He singled out a striker named Manual Cruz who also testified for the General Counsel. Stewart asked Cruz, an employee since 1991,

[12] I am not troubled by the initial confusion over the date of the incident and none of Respondent's witnesses had difficulty in addressing the matter.

"how old are you, 55. You're too old to get a job any place else. Why don't you retire now. I don't need you fucking wetbacks."

Stewart did not explicity deny the remarks in issue but rather portrayed whatever he may have said as righteous indignation at the invasion of his neighborhood. In its brief (p. 51–52), Respondent picks up this theme and takes great liberties with it. Respondent contends that it has been established that the pickets somehow threatened Stewart's daughter and forced her to return home in tears, from the school bus stop. Stewart's daughter did not testify,[13] nor is a copy of the so-called wanted poster in the record. Stewart did not purport to witness any improper union conduct, but was only allegedly responding to what his daughter supposedly had reported to him.

Whatever the surrounding circumstances may have been, Respondent had a choice of remedies. For example, it could have and may have filed charges with the Board over this incident. Respondent could have and may have sought a contempt finding before the State court judge who issued an injunction against the Union during the strike. In light of these remedies, I no longer believe it necessary to evaluate in this case the conduct of the Union in Stewart's neighborhood.[14] Nor do I find any defense which Respondent could rely on such as provocation by the Union.

To be sure during the hearing, I expressed some tentative sympathy for Stewart and noted Board CA cases which will excuse certain behavior of an employee who might be unlawfully disciplined for conduct that was provoked by an employer. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 151–152 (1996), and *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1992). Here, however, the alleged provocation is unproven; moreover, the Union's unclean hands is no defense to charges otherwise proven.[15] *Goodyear Tire & Rubber Co.*, 271 NLRB 343, 346 fn. 10 (1984); *Rivera-Vegas v. ConAgra, Inc.*, 876 F.Sup. 1350 (D.Puerto Ricco 1995), and citations listed there. Most importantly, I see no nexus between the alleged provocation and the statement made to Manual Cruz, perhaps the most vulnerable of those present due to his age. For the reasons given, I find that Respondent violated the Act as alleged by Stewart telling Cruz to retire rather than to continue the strike. *Heritage Nursing Homes*, 269 NLRB 230, 231 (1984).

8. Alleged unlawful statements of Terry Stewart

On September 25, Manuel Leon, a witness for the General Counsel, was picketing at the Summerlin jobsite. Prior to the strike, Leon had worked with foreman Terry Stewart. When T. Stewart came out to the picket line in the early morning, he looked at those picketing and observed dismissively, "half you guys don't even work for us." Then Stewart recogned Leon and said to him in English, "Manuel you better watch out for Immigration." Granillo translated Stewart's remarks into Spanish so Leon could understand.

Called as a Respondent witness, Terry Stewart not only denied the remarks in question, but also testified that on September 25, he worked at the Reynolds Foundation jobsite, not the Summerlin job. To support this testimony, Respondent offered Stewart's daily logbook (R. Exh. 1). Stewart allowed that in August Leon had picketed at a jobsite where Stewart worked but he denied making the remarks in question then or anytime.

In rebuttal, the General Counsel called a union organizer from Southern California named Louis Medina who testified that someone named Stewart made the remarks in quesiton to Leon. Medina was on temporary duty in Las Vegas and didn't know the key players by name. However, his description of the person someone said was Terry Stewart fit Terry Stewart. Admittedly, there is a discrepancy between the testimony of Granillo and Medina as to whether the former translated the remark in question into Spanish. As to the conflict between Stewart's logbook and the alleged date of the incident, this issue is not significant. Considering all factors involved, I credit General Counsel's witnesses and find that Terry Stewart made the remarks in question. A threat to report an employee to Immigration and Naturalization Service for engaging in union or other protected activities violates the Act and I so find. *Impressive Textiles, Inc.*, 317 NLRB 8, 13 (1995), *Carl's Jr.*, 285 NLRB 975, 987 (1987).

9. Alleged interrogation and threats by Arturo Pulido

According to this portion of Leon's testimony, he and another striker named Francisco Gonzales who did not testify, were picketing at the Sunrise Casino jobsite in August. Leon testified that Arturo Pulido, the job superintendent and admitted supervisor asked him where the organizers were and Gonzales answered that they were not there at the moment. Then Pulido supposedly said he was going to turn on a tape recorder and asked if the pickets weren't embarrassed picketing and if the witness knew what they were fighting for. Leon said the pickets were fighting for their rights and the rights of their families. Pulido then allegedly asked if the organizers were training the pickets "because, if not, when we came to something like this, they were going to put us in a room by ourselves and that we were going to lose because we didn't know anything, that something like that had already happened to him" (Tr. 454).

In his testimony as Respondent's witness, Pulido first of all creates a minor discrepancy regarding the time of the alleged incident, recalling a conversation in September at the Sunrise Casino. More importantly, Pulido testified that he asked Leon

[13] Respondent's attorney represented at hearing that Stewart's daughter is 9 years old (Tr. 449).

[14] Out of an abundance of caution, the Union has briefed the issue of the Union's conduct. Of the cases cited, *Carpenters Local 1098 (Womack, Inc.)*, 280 NLRB 875 (1986), seems the most pertinent. There the Board held that picketing of a high-ranking management official's residence did not violate the Act by coercing the employer in the selection of its representatives.

[15] During the hearing, evidence was presented that Union Organizer Efren Hernandez gave Respondent employee Juan Meza $500 in cash so Meza could get married without returning to work during the strike. Meza accepted the money, got married, and after his honeymoon went back to work anyway. The "loan" has never been repaid. After a full airing of the facts and circumstances surrounding this single tender of cash, I conclude that Hernandez demonstrated poor judgment to say the least, that this matter has nothing to do with any issue in this case, and that any further pursuit of the issue must be done if at all, in another forum.

if he knew who had shined a light in his eyes as he drove a vehicle through the picket line the day before.

According to the General Counsel, Pulido's remarks that employees would be put in a room, coupled with the statement concerning how they would lose, amounts to more than just abstract animus, but rather conveyed the impression that an employee's union activities might result in discipline (Br. 39). The General Counsel also claims that the question of where the organizers were violates the Act.

I reject the General Counsel's argument here and I will recommend dismissal. First, I find that Leon's testimony is too ambiguous to support a finding of a violation. For example, who was going to put the pickets in a room and what were they going to lose—the strike, their wages or something else. Even giving the testimony the "spin" of the General Counsel's, I am hard pressed to find any unlawful element of coercion. As to the supposed interrogation, the missing element of coercion is even more apparent. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

In any event, I will also recommend dismissal on credibility grounds noting the absence of Gonzales as a corroborating witness and my inability to find that Leon is more credible than Pulido.

10. Status of strike

The General Counsel and the Charging Party contend that the strike which began on July 28 was an unfair labor strike. Respondent says economic strike.

A strike is an unfair labor practice (ULP) strike if it is "caused in whole or in part by an employer's unfair labor practices. . . ." *Calex Corp. v. NLRB*, 144 F.3d 904, 911 (6th Cir. 1998); *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), cert. denied 347 US 953 (1954). A striker who has been engaged in a ULP strike is entitled to reinstatement to his former job upon an unconditional offer to return to work. If a striker's former job no longer exists, then reinstatement must be to a substantially equivalent position, even if striker replacements must be terminated to make room for the returning striker. *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Marchese Metal Industries*, 313 NLRB 1022, 1032 (1994). The unconditional offer to return to work is an essential perquisite to a finding of unlawful failure to reinstate. *Orit Corp.*, 294 NLRB 695 (1989); *Domsey Trading Corp.*, 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2d Cir. 1994).

To determine the character of the strike in issue, I turn to the record and note at the onset that all relevant factors do not point uniformly in one direction or the other. Looking first at the evidence supporting the General Counsel's theory, of a ULP strike, I note the following:

(1) As found above, Respondent did commit prior to the strike an unfair labor practice involving V. Mendez. Surely the t-shirt incient was a factor in Mendez going out on strike. *Mauka, Inc.*, supra, 327 NLRB [803].

(2) At a number of pre-strike meetings, employees discussed their perception of V. Mendez' treatment as well as other subjects such as getting higher wages and more benefits. Both General Counsel witnesses Gerardo Mercado and Cristobal Corona, testified that before they went out on strike against Respondent all these matters were discussed. More specifically, Corona testified as to V. Mendez that he had been an employee of Respondent's for 17 years, and had been fired[16] for wearing a union t-shirt. Corona and others considered and discussed what would happen to them with less time with the company [Tr. 473]. These discussions of unfair labor practices at pre-strike meetings demonstrate that they are a contributing factor in the decision to strike. *I.W. Corp.*, 239 NLRB 478 (1978).

(3) The Union notice to Chad Stewart of July 28 characterized the strike as an unfair labor practice [BTOP Exh. 14].[17]

(4) All or most of the picket signs referred to an unfair labor practice strike [GC Exh. 7]. Much was made of this issue during the hearing. It appeared that prior to the strike, the Union ordered 2000 picket signs containing the legend, "On strike, no contract," for use against a different employer. When that matter was resolved before any strike, the Union used the some signs in the strike against Respondent. However, beginning on Day 1 of the strike, the Union covered the original sign with a new stapled sign indicating an Unfair Labor Practice against Respondent. This is a factor in finding an unfair labor practice strike. *Page Litho*, 311 NLRB 881 (1997), p. 891 of J.D.; *R & H Coal Co.*, 309 NLRB 28 (1992), enfd. 16 F.3d 410 (4th Cir. 1994).

I turn next to Respondent's evidence tending to show that the strike was economic. Respondent called several employee witnesses who had gone on strike and in most cases crossed the picket line to return to work early. According to those witnesses, the subjects discussed at the prestrike meetings, while they were in attendance concerned only economic matters. Many of these witnesses left early or were inattentive at the meetings. General Counsel's witness Efren Hernandez, the principal union organizer, corroborated the General Counsel witnesses Mercado and Corona who testified that the Mendez matter was discussed and of concern to some who went out on strike. I credit the General Counsel's evidence on this point.

A work stoppage by employees is considered an unfair labor practice strike if it is motivated at least in part, by an employer's unfair labor practices. *Mauka, Inc.*, supra, 327 NLRB 803; *C-Line Express*, 292 NLRB 638 (1989). Characterization of a strike as such is not dependent on a finding that the strike would not have occurred but for the commission of the unfair

[16] While Mendez had not been fired for wearing a union T-shirt, he had been refused permission to wear the shirt. Variance between the facts and perceptions of employees does not detract from the causation factor of the strike.

[17] Other similar notices from Union Official Ozinga who testified as a BTOP witness such as notices to the media (BTOP Exh. 12) or to other unions (BTOP Exhs. 16, 19), wherein the strike was characterized as an unfair labor practice strike are too self-serving and entitled to little or no weight. The notice to Repsondent is entitled to some weight however, since it put Respondent on notice as to the Union's theory.

labor practices Rather, so long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike. *Decker Coal Co.*, 301 NLRB 729, 746 (1991). *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 5 (1995), enfd. 77 F.3d 461 (3d Cir. 1996), quoting *NLRB v. Cost Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 719 U.S. 850 (1972).

In weighing the factors listed above and all the evidence in this case, I find that the strike was a ULP strike, because it was caused, at least in part, by Respondent's ULPs. In so concluding, I have been cognizant of the Board's admonition in *C-Line Express*, supra, 292 NLRB 638, enfd. denied 873 F.2d 1150 (8th Cir. 1989), taken from *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1086 (1st Cir. 1980), that both the Board and the courts "must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual content." With all due respect, the truth in the present case is that the union witnesses did not impress me as sophisticated at least not in such a way as to be disingenuous regarding the nature of the strike.

I have also heeded the court's admonition in *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 517 (4th Cir. 1998), to find a causal connection between the ULPs and the strike, which I do. In this regard I note that Respondent's strikers can be divided into two groups: (1) the "true believers" and (2) those less committed. The former are those dedicated to the union's message and see employee solidarity as an act of faith necessary for salvation. This group which included Mendez, Mercado, and Corona considered the stirke necessary to vindicate rights of all concerned. The latter group looks more at their personal circumstances and less at others. As an alternative finding, I can credit both groups of employee witnesses, one called by the General Counsel, the other called by Respondent, since in a sense they were not in direct conflict with each other. Nevertheless under Board precedent, I am compelled to find that the strike beginning on July 28 was an unfair labor practice strike. See *Larand Leisurelies*, 213 NLRB 197 fn. 4 (1974), enfd. 523 F.2d 814 (6th Cir. 1975).[18]

11. Union's offer to retun to work, conditional or unconditional

On September 3, Union Official James Sala wrote a letter to Respondent which it received stating:

> The workers on the list attached to this letter hereby offer unconditionally, through the undersigned to return to work from their unfair labor practice strike.
>
> [Attached list of 40 names.] (GC Exh. 12.)

On September 8, Sala sent a second letter threatening to file additional charges with the NLRB unless Respondent answered the Union's letter (GC Exh. 13).

Apparently, Respondent did reply by letter dated September 4, in which it claimed to have no current job openings and offering to place returning strikers on a preferential hire list. The letter further noted that certain employees terminated for acts of violence on the picket line will not be rehired. The letter concluded with a request for current phone numbers and addresses of those employees making the unconditional offer to return list (GC Exh. 14).

On September 14, Sala wrote the final letter in this series. It is a long letter and need not be published in its entirety. Only the final paragraph is relevant:

> . . . the strikers are not prepared to return to work unless all those who have offered to return are put back to work, to the extent that work (including that presently being performed by replacements) is available. However, it is understood that several strikers have been accused of strike misconduct, and the position of the other strikers is not conditional on the return of these accused strikers. While we do not regard the accusations as having any merit, separate unfair labor practice charges have been filed with respect to them and we will continue to deal with them separately for the time bieng.

(GC Exh. 15.)

I begin with the unremarkable proposition as noted above, that an employer has no duty to reinstate strikers unless and until an unconditional offer to return to work from the strike is made. *McAllister Bros., Inc.*, 312 NLRB 1121, 1123 (1993); *Clow Water Systems Co. v. NLRB*, 92 F.3d 441, 442 (6th Cir. 1996); *Allied Mechanical Services*, 320 NLRB 32 (1995). I have found above that the strike was an unfair labor practice strike; I find here that the Union made an unconditional offer to return to work.

Sala's first letter of September 3 was clearly an unconditional offer to return on behalf of those named in the attached list. Respondent's obligation to reinstate the employees, discharging if necessary, the replacement employees, arose immediately. However, Respondent elected to treat Sala's letter as an unconditional offer to return economic strikers. As stated in *Capital Steel & Iron Co. v. NLRB*, 89 F.3d 692 (10th Cir. 1996), the employer may not rely on later union demands made in response to a situation created by its own failure to reinstate the strikers [immediately] as a basis for arguing that the Union's initial offer to return to work was conditional. Citing *J. M. Saheim Music Co.*, 299 NLRB 842, 848 (1990).

Respondent's argument, brief at 76–77, appears to be based on the premise that the strikers were economic strikers. But even under this theory—which I have rejected above—where the Union states that the strikers would return only if they were all immediately reinstated, the offer is not thereby rendered conditional. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1107 fn. 47 (1st Cir. 1981).

Even if Sala's two letters must be considered as one, the Union was merely asking for what it was entitled to in offering to return from an unfair labor practice strike. See *Child Develop-*

[18] At pp. 74–75 of its brief, Respondent raises two issues which need not be considered. In my opinion, the evidence establishes a ULP strike from the beginning and thus any question of conversion of an economic strike into a ULP strike is not presented. In addition, Respondent asserts that it oculd prove the strike was unprotected if the General Counsel only turned over certain evidence in its possession which the General Counsel allegedly possed to support the CB cases. Respondent does not describe this evidence (Respondent failed to request that the CB affidavits which I found to be irrelevant in my in-camera examination be made part of the record), and I find its claim here to be utterly devoid of merit.

ment Council of Northern Pennsylvania, supra, 316 NRLB at 1146 (by demanding immediate reinstatement of all unfair labor practice strikers regardless of replacements, the union was merely insisting that Respondent accord its employees their rights as unfair labor practice strikers). Compare, *NLRB v. Independent Assn. of Steel Fabricators, Inc.*, 582 F.2d 135, 152 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979).

I agree completely with the Union (Br. 38), that Respondent's individual offers of reinstatement to certain former strikers were invalid. As the Board stated in *Orit Corp.*, 294 NLRB 695 fn. 3 (1989), the Respondent never made a valid offer of reinstatement because it failed to respond to the Union and instead notified a limited number of individual employees directly as to the circumstances of their return (piecemeal reinstatement) (R. Exhs. 5(a)–(ee)).

Because the reinstatement offers are invalid, Respondent was not entitled to treat nonreturning employees as having abandoned their employment. An employee does not waive reinstatement by failing to respond to an inadequate offer. *Orit Corp.*, supra, 294 NLRB at 699.

To reapitulate, I have found that the strike was a ULP strike, and that the Union submitted an unconditional offer to return to work. I now find that Respondent did not satisfy its obligation with respect to the returning ULP strikers. As recently stated by the administrative law judge in *Detroit Newspapers*, supra, 326 NLRB at 784:

> Unfair labor practice strikers are entitled to reinstatement upon their unconditional offer to return to work, displacing, if necessary, any replacements hired during the strike. *Mastro Plastic Corp. v. NLRB*, 350 U.S. 270 (1956). An employer violates Section 8(a)(3) and (1) of the Act by failing to offer reinstatement to unfair labor practice strikers who have made an unconditional offer to return to work. *Cal Spas*, 322 NLRB 41 (1996). In order to permit an orderly return to work, the Board affords an employer a 5-day period in which to return the former strikers to work without incurring a backpay obligation. However, when that 5-day period is ignored, then backpay obligations begin from the date of the unconditional offer to return to work. *La Corte ECM, Inc.*, 322 NLRB 137 (1996).

Based on the above, I find that Respondent has violated Section 8(a)(3) and (1) of the Act by failing to offer reinstatement to ULP strikers who have made an unconditional offer to return to work.[19]

[19] There is no issue before me regarding any claim by Respondent that it had a legitimate and substantial business justification for refusing to discharge permanent replacemnts. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Hotel Roanoke*, 293 NLRB 182, 185 (1989); *NLRB v. Champ*, 933 F.2d 688, 697 (9th Cir. 1990). Furthermore, I decline to consider Respondent's argument (Br. 81), that employees should have mitigated damages. To the extent, that Respondent presents a valid issue, it may be litigated at a compliance hearing. See *NLRB v. Iron Workers Local 433*, 600 F.2d 770, 778 (9th Cir. 1979).

12. Alleged misconduct of three strikers

On September 2, Respondent notified Jose Herrera and Caesar Corona by mail that they were terminated for picket line misconduct on August 5, at a Majestic Runway project at Sunset Road and Escondido (GC Exh. 5(b)). On September 10, Respondent notified Cristobal Corona that he was terminated for picketline misconduct on September 3, at the same place (GC Exh. 5(b)). Neither Herrera nor Caesar Corona testified, but Cristobal Corona did testify.

Respondent called an employee named Heriberto Barragan to describe what Herrera did. Barragan had been a striker, but returned to work before the strike was over. Barragan was a passenger in a truck being driven through the picket line by Emilo Pinal in August when Herrera opened the passenger side door and told Bernal to return to the strike, but Bernal refused saying he had family responsibilities. At this point, while other strikers blocked the truck, Herrera grabbed Bernal by the chest and shoulders and pulled him out of the truck. In al important respects, Barragan's account of this incident was corroborated by Respondent's witness Emilo Pinal. Since Herrera never testified, I credit Barragan and Pinal and find the incident happened just as Barragan described it.

Another Respondent witness was Angel Huirtron, who crossed the picket line after being on strike for 4 days. During the second week of the strike, Huirtron was driving his truck thorugh a picket line when it was blocked by pickets. His passenger Jose Bonal was pulled out of the truck by Ceasar Corona and Ramon Vargas (also terminated but not placed in issue by the General Counsel). Apparently before Bonal actually left the vehicle, two coworkers also riding in the truck, Barragan and Juan Martinez pulled him back. As part of this incident, about $300 in tools were taken from Huirtron's truck by Corona and Vargas. However, when the police were called, the tools were returned anonymously, in response to police demands.

In the absence of Caesar Corona, I credit Huirtron to find that the incident happened just as he described it.

As to Cristobal Corona, Respondent's foreman, Pat McDevitt, testified to an incident in early September where he was attempting to drive his truck out of the jobsite when the pickets blocked it, in violation of a state court injunction (GC Exh. 5(b), pp. 11–14). To get through the line, McDevitt began to inch his way until the truck touched Cristobal Corona. Then according to McDevitt, Corona began to scream and yell pretending to be inured and causing the other pickets to be incited against McDevitt.

Unlike the other two alleged discriminatees, Cristobal Corona did testify as General Counsel's witness, but he did not address this incident. Accordingly, I credit McDevitt and find the incident happened as he described it.

I note that no one was injured in the three incidents described above.

In *Medite of New Mexico v. NLRB*, 72 F.3d 780, 790 (10th Cir. 1995), the court recited the applicable burdens in a strike misconduct case. First, the General Counsel bears the burden of establishing a prima facie case that the strikers were denied reinstatement for strike-related misconduct, citing *Clougherty Packing Co.*, 292 NLRB 1139 (1989). I find that the General

Counsel has established a prima facie case, a finding not disputed by Respondent (Br. 42).

Next the employer may defend its decision not to reinstate by showing it had an "honest belief" that the strikers had engaged in misconduct, citing *Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7th Cir. 1992). The burden then shifts back to the General Counsel to prove that no misconduct occurred citing *Schreiber Mfg. Inc. v. NLRB*, 725 F.2d 413, 415 (6th Cir. 1984); *Clougherty Packing Co.*, supra, 292 NLRB at 1139.

In this case I find that Respondent did have an honest belief that certain strike misconduct occurred. Respondent relied on reports made by nonstriking employees, supervisors, and police reports. In addition, Respondent's good faith belief may be cased on CB complaints issued by the Region alleging strike misconduct. *Gem Urethane*, 284 NLRB 1349, 1353 (1987). (See Exhibit A to R. Br.). I also note that Respondent persuaded a state court judge to issue an injunction against picket line misconduct on September 2 (GC Exh. 5(b)), and McDevitt had a copy of the injunction in his possession at the time of the incident. Finally, I note that Chad Stewart notified each of the three alleged discriminatee of the accusation in question, and invited them to submit evidence in their defense. None did so. In light of these facts, the only issue to be decided is whether the strike misconduct in issue for the three alleged discriminatees is sufficiently serious to warrant discharge. *Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986).

As to Herrera and Caesar Corona, the General Counsel appears to concede (Br. 33) that their conduct would warrant discharge, but for a "double standard" allegedly used by Respondent in condoning misconduct of nonstrikers and supervisors, an issue to be discussed below. In its brief (p. 43), the Union contends that a striker is protected by the Act from employer retaliation, "where a striker's misconduct poses no threat of injury to persons or property", citing *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989). The Union goes on to state (p. 43) that this standard has not been met where Herrera and Caesar Corona briefly blocked a vehicle, "opened the passenger door" of a truck stopped at the picket line and "ushered the passenger out of the truck."

I find the Union's argument to be without merit. What it calls "ushering the passenger out of the truck," is instead grabbing the passengers and pulling them involuntarily out of the truck to an unknown fate among a group of angry pickets. The precedents cited by Respondent (Br. 43), *International Paper Co.*, 309 NLRB 31 (1992), and *Calmat Co.*, 326 NLRB 130 (1998), convince me that Herrera and Caesar Corona's misconduct posed a significant threat of injury to persons and property.[20] That no one was injured was due more to good luck rather than design of the terminated employees.

While I agree with the General Counsel that the evidence against Cristobal Corona is less compelling than that offered against the other two, I nevertheless find that his conduct posed a significant threat to McDevitt. That is, by provoking an incident by blocking McDevitt's vehicle in apparent violation of the state court injunction and then by feigning injury, Cristobal Corona inflamed the other pickets who might well have attacked McDevitt in retaliation for injuring Corona. Again, only fortudious circumstances prevented this from happening.

In sum, I find that based on the Board's lead case, *Clear Pine Mouldings*, 268 NLRB 1044 (1984), the conduct in issue for the three alleged discriminatees is misconduct [which] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

Before concluding this segment, I must consider various of the Union's arguments, some of which are more credible than others. One from the lower or less credible end of the spectrum is found at page 44, fn. 10, where the Union claims it was McDevitt rather than Cristobal Corona who caused the incident. I reject this contention and find it unworthly of discussion.

Another argument could perhaps be placed at the midpoint of the scale. At page 45 of its brief, the Union attacks Respondent's claim applicable to all three alleged discriminatees that their conduct violated the Respondent's Workplace Violence Policy (GC Exh. 46). In pertinent part, this policy admonished employees "to perform their job without violence toward any other individual. Precision Concrete expects all of its employees to work in a manner so that they can perform their duties in a safe and productive manner." The policy goes on to list at paragraph 2 Prohibited Activities for Current Employees, the violation of which could result in discipline "up to and including dischage" for any of the following:

> G. Refusing to participate in an investigation pertaining to allegations or suspicion that violence has or is likely to occur, . . .
>
> At paragraph 3, Definitions A. "Crime of Violence or Violence: Includes but is not limited to assault, battery . . ." Finally, "this policy covers all employees of Precision Concrete. . . " I find that the allegations against the three alleged discriminatees consitute behavior prohibited by the Workplace Violence Policy and these allegations have been proven. That is the three alleged discriminatees did not respond to Chad Stewart's letter asking for their side of the issue nor did they otherwise cooperate. The violence committed is evident from the facts.

It is true as noted above, that this policy was not widely distributed to employees, was not translated into Spanish, and was kept in the office. However, these facts are unavailing to the Union. For even without this policy, the behavior in question is sufficient to warrant discharge as it meets or exceeds the standard in *Clear Pine Mouldings*, supra. Cf. *Frazier Industrial Co.*, 328 NLRB 717 fn. 4 (1999), citing *Crestfield Convalescent Home*, 287 NLRB 328, 344–345 (1987), enf. denied on other grounds 861 F.2d 50 (2d Cir. 1988) (mere absence of valid no-solicitation/no-distribution rule does not confer on employees the absolute right to discuss union matters during worktime to the detriment of their work performance. . .).

Finally, the Union raises an argument which is colorable, but at the end of the day, this argument too must fail. At page 47 of

[20] To these two precedents, I add another, *NLRB v. Kelco Corp.*, 178 F.2d 578 (4th Cir. 1949), where the evidence consisted of an assault against a nonstriker, and the claim that failure to secure a criminal conviction for the conduct in question constituted some type of defense. The court fond the assault to be serious miscondut and rejected the proferred defense. The Union's similar defense at Br. 46, fn. 11 is without merit.

its brief, the Union argues that Respondent discriminated against strikers by failing to investigate reports of strike-related violence by nonstrikers. This same argument is raised by the General Counsel (Br. 33) but for different reasons. In *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988), the Board addressed the so-called "double standard," and held that an employer may not knowingly tolerate behavior by nonstrikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny reinstatement to jobs. See also *Domsey Trading Corp.*, 310 NLRB 777, 778 (1993).

I turn first to the General Counsel who contends that Chad Stewart failed to discipline some employees for fighting with Len Taylor, a union organizer. I turn to page 68 of the transcript, as directed by the General Counsel in his brief:

> GC: And you saw him (Taylor) around September at the Sunrise Casino and a fight broke out?
>
> Chad Stewart: That's correct.
>
> Q: In fact, a couple of your employees were engaged in that fight, correct?
>
> A: Among others.
>
> Q: Among others. Okay, one of them was Nathan Grier, his name is Pokey?
>
> A: . . . We did have a Nathan Grier working there.
>
> . . . .
>
> There was a father, son, a Nathan and a Gary.

No details of this fight were presented—it isn't even clear who was fighting' and when Taylor testified as General Counsel's witness, he did not cover this subject. Testifying as Respondent's witness, Chad Stewart referred to a hearing before a state court judge where Respondent was seeking a contempt citation against the Union. Taylor testified in court for the Union that a nonstriker hit him in the chest with a rock, but Stewart took no action against the accused person as he had already left Respondent's employment. In light of the above, the General Counsel offers no facts to meet the *Aztec Bus* double standard, and I find his argument to be without merit.

Turning now to the Union's argument, I begin with Chad Stewart's testimony at page 64 of transcript, where he testified that when a credible report of violence comes in, he takes it under advisement. At page 139 of transcript, Stewart elaborated on the criteria for finding a given report to be "credible:" "Partly who it came from . . . where I heard it. Some of them I read in sworn affidavits to the NLRB and some of them I read in police reports and that's why I assigned them credibility." As to the 4–5 letters Stewart received from Union Official Jim Sala, they provided no specifics such as when, where, who. They were form letters and Stewart didn't assign them much credibility (Tr. 139). In addition, Chad Stewart didn't consider Sala to be credible (Tr. 1326).

Sala's letters are not in the record so it is impossible to know what information was contained therein. The Union argues that Chad Stewart treated Sala's form letter reports differently than it treated the personal statements, affidavits and police reports leading to the termination of Herrera and the two Coronas. I assume without finding that the Union's theory would fall within the double standard purview of the *Aztec Bus Lines* holding. However, I also find that said theory is unsupported by a factual predicate. Like Taylor, Sala himself never addressed the subject of alleged disparate treatment in his testimony as General Counsel's witness. No striker testified, no police reports were offered and the record doesn't show what information was brought to the attention of Chad Stewart by Sala's 4–5 letters. The Union's defense is without merit and I will recommend dismissal of the allegations regarding Herrera and Caesar and Cristobal Corona.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3 Respondent's statute of limitations defense is without merit.

4. Respondent's foremen are statutory supervisors and/or Respondent's agents.

5. Respondent has violated Section 8(a)(1) of the Act by refusing to allow employees to wear union T-shirts, by its coowner Chad Stewart making threats of plant closure and statements of futility on account of employees seeking union representation, by Chad Stewart telilng an employee to retire rather than continue to strike and by its supervisor, Foreman Terry Stewart threatening an employee to call the Immigration and Naturalization Service for engaging in union or other protected activities.

6. The strike beginning on July 28 was an unfair labor practie strike from its inception.

7. The Union's letters of September 3 and 14 to Respondent considered either separately or as a single letter, constitute an unconditional offer to return to work for those employees listed in the September 3 letter.

8. Respondent has violated Section 8(a)(3) and (1) of the Act by failing to offer proper reinstatement to ULP strikers who have made an unconditional offer to return to work, except for Ceasar Corona, Cristobal Corona, and Jose Herrera, who committed serious picket line misconduct.

9. By the aforesaid conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully failed and refused to reinstate the unfair labor practice strikers on the Union's unconditional offer to return to work, I shall recommend that the Respondent be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed, dismissing if necessary any persons hired after July 28, 1998, and make the strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate them from the date of their

offer to return to work. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Precison Concrete, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow employees to wear union T-shirts or other union insignia while working.

(b) Threatening employees with plant closure if they continued their union activities and stating to employees that it would be futile to seek union representation.

(c) Telling an employee he should retire rather than continue to strike.

(d) Threatening a striking employee that Respondent would call the Immigration and Naturalization Service if the employee continued to strike.

(e) Failing and refusing to immediately reinstate unfair labor practice strikers to their former positions on the Union's unconditional offer to return to work.

(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer all of the unfair labor practice strikers, listed below, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make the strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to immediately reinstate them on their unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

Last Name	First Name, M.I.
1. Arteaga	Gumaro
2. Candelaria	Ronnie
3. Carra	Cesareo
4. Cobarrumias	Jesus
5. Flores	Luis
6. Gomez	Carlos
7. Gonzales	Francisco
8. Gonzales	Luis
9. Guerrero	Vicente
10. Gutierrez	Arnulfo
11. Gutierrez	Jose
12. Hernandez	Jose A.
13. Jimenez	Alfredo
14. Martinez	Abel
15. Martinez	Jorge H.
16. Mendez	Juan C.
17. Mercado	Carlos
18. Mercado	Gerado
19. Montano	Heriberto
20. Nava	German
21. Orellana	Luis A.
22. Peregrino	Nicholas
23. Pimentel	Felipe
24. Ramirez	Amador
25. Ramirez	Joel
26. Rangel	Armando
27. Reyes	Guerrero
28. Rojas	Joel
29. Rueda	Juan C.
30. Santana	Ramon
31. Santana	Victor
32. Terriquez	Manual
33. Vargas	Ramon
34. Vazquez	Melchor
35. Verdeja	Abel
36. Verdusco	Joaquin
37. Zermeno	Hector

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examinaiton and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked, "Appendix,"[22] both in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since July 10, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated: August 23, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow employees to wear union T-shirts or other union insignia while working.

WE WILL NOT threaten employees with plant closure if they continue their union activities.

WE WILL NOT tell employees it would be futile to seek union representation.

WE WILL NOT tell an employee he should retire rather than continue to strike.

WE WILL NOT threaten a striking employees that we will call the Immigration and Naturalization Service if the employee continues the strike.

WE WILL NOT discriminate against unfair labor practice strikers by failing and refusing to immediately reinstate them, to their former positions on the Union's unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer all the below listed unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make the strikers whole for any loss of earnings and other benefits suffered as a result of Respondent's refusal to immediately reinstate them upon their unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

1. Arteaga	Gumaro
2. Candelaria	Ronnie
3. Carra	Cesareo
4. Cobarrumias	Jesus
5. Flores	Luis
6. Gomez	Carlos
7. Gonzales	Francisco
8. Gonzales	Luis
9. Guerrero	Vicente
10. Gutierrez	Arnulfo
11. Gutierrez	Jose
12. Hernandez	Jose A.
13. Jimenez	Alfredo
14. Martinez	Abel
15. Martinez	Jorge H.
16. Mendez	Juan C.
17. Mercado	Carlos
18. Mercado	Gerado
19. Montano	Heriberto
20. Nava	German
21. Orellana	Luis A.
22. Peregrino	Nicholas
23. Pimentel	Felipe
24. Ramirez	Amador
25. Ramirez	Joel
26. Rangel	Armando
27. Reyes	Guerrero
28. Rojas	Joel
29. Rueda	Juan C.
30. Santana	Ramon
31. Santana	Victor
32. Terriquez	Manual
33. Vargas	Ramon
34. Vazquez	Melchor
35. Verdeja	Abel
36. Verdusco	Joaquin
37. Zermeno	Hector

PRECISION CONCRETE

Richard C. Fiol, Esq., for the General Counsel.
Gregg Tucek (at hearing) and *Gerald Morales* and *Drew Metcalf, Esqs.* (on brief), of Phoenix, Arizona, for the Respondent.
Timothy Sears, Esq., of San Francisco, California, for Building Trades Organizing Project and *Daniel M. Shanley, Esq.*, of Los Angeles, California, for the Carpenter's Union.

SUPPLEMENTAL DECISION

MICHAEL D. STEVENSON, Administrative Law Judge. Shortly after I issued my original decision on August 23, 1999, the General Counsel submitted a letter asking me to clarify my decision regarding a second alleged unconditional offer to return to work, an issue raised in paragraphs 6(e) and (f) of the amendment to the consolidated complaint. I informed the General Counsel and the other parties that I lacked jurisdiction to make substantive revisions of my decision absent a remand from the Board. The General Counsel then submitted to the Board, a Request to Remand the Administrative Law Judge's Decision, which request was granted on October 1.

On October 6, 1999, I solicited the views of the parties with respect to whether additional briefs would be useful in resolving the pending issue. Only Respondent has requested a briefing schedule to address its argument that there is no evidence on the record that there were jobs available at the time of the second alleged unconditional offer to return to work. According to Respondent, this "lack of jobs constitutes a complete defense to the refusal to reinstate strikers." Contrary to Respondent, I find that briefs are not required since the revision of

my decision that I make below follows logically from my original decision, particularly section B,10 (Status of the Strike) wherein I found that an unfair labor practice strike existed and section B,11 (Union's Offer to Return to Work, Conditional or Unconditional) wherein I found that the Union had submitted an unconditional offer to return to work on or about September 3, 1998. Essentially for the same reasons contained in those two sections and in my entire decision, I make the following additional finding and conclusions with respect to paragraphs 6(e) and (f) of the amendment to the consolidated complaint.

On January 13, 1999, the Union through its official, James Sala, sent a letter to Respondent which reads as follows:

> Mr. Chad Stewart, President
> PRECISION CONCRETE
> 1640 West Brooks Avenue
> North Las Vegas, NV 89030
>
> Re: Return to Work
>
> Dear Mr. Stewart:
>
> The workers on the list attached to this letter hereby offer unconditionally, through the undersigned to return to work from their Unfair Labor Practice strike.
>
> Please notify the undersigned when and where they should return to work.
>
> Sincerely,
>
> /s/ James Sala
>
> James Sala
> Organizer
>
> [GC Exh. 33(a).]
> [List of attached names omitted.]

I find that this letter constitutes a second unconditional offer to return to work and that the letter was received by Respondent on or about January 14, 1999. Respondent's failure to reinstate these unfair labor practice strikers constitutes a violation of Section 8(a)(1) and (3) of the Act.

Respondent's response of January 19, 1999 to the Union's letter was admitted into evidence and reads as follows:

> Mr. James Salas
> Building Trades Organizing Project
> 4151 E. Bonanza Road
> Las Vegas, NV 89111
>
> RE: Unconditional offer to return to work
>
> Dear Mr. Salas:
>
> We have no job openings at the present time. The workers on the list that you provided will be placed on a preferential hire list and will be offered positions, as they become available. We will hire back based on seniority within skill classification. Seniority will be based on an employee's most recent date of hire.
>
> Workers, who have been terminated for acts of violence committed on the picket line, will not be rehired. Those individuals have been notified of their status.
>
> We request that you provide us with the current phone numbers, and addresses of those employees on the unconditional offer to return list. This will insure that when we are able to make offers of employment, that we can contact them in a timely manner.
>
> Sincerely,
>
> /s/ Chad Stewart
>
> Chad Stewart
>
> [GC Exh. 33(b).]

Assuming I have correctly found an unfair labor practice strike in my original decision, this letter is of no benefit to Respondent since the letter, in effect, proposes to treat this second group as returning economic strikers, a status with fewer rights and benefits than they deserve.[1]

AMENDED REMEDY

At page 28, line 10 . . . change the line to read . . . upon the Union's two separate unconditional offers to return to work . . . .

AMENDED ORDER

Add new paragraph 2(b):

> Offer all the unfair labor practice strikers, listed below, who unconditionally offered to return to work by letter from the Union of January 13, 1999 immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make said strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to immediately reinstate them upon their unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

Last Name	*First Name, M.I.*
1. Alvares	Juan Manuel
2. Anchondo	Carlos
3. Arias	Cuauhctemoc
4. Cano	Mario
5. Chavez	Joel
6. Cruz	Manuel
7. Curiel	Isalas
8. Curiel	Santos
9. Del Rio	Rodolfo
10. Delgado	Hilario
11. Diaz	Rufino E.
12. Fileto	Luis S.
13. Gomez	Arturo
14. Gomez	Clemente
15. Gomez	Jose A.
16. Gonzalez	Fabian

[1] To the extent that Respondent's defense of lack of jobs for failing to reinstate this second group of ULP strikers has any validity, it may be subject to litigation in the compliance phase of this case.

17. Hernandez	Raul
18. Horia	Joaquin
19. Ibarra	Francisco
20. Leon	Manuel
21. Maldonado	Antonio
22. Martinez	Gabino
23. Mendez	Valentin
24. Meza	Eduardo
25. Meza	RiosEduardo
26. Michel	Jaime
27. Michel	Sergio
28. Moreno	Sergio
29. Padilla	Jaime
30. Parra	Leopoldo
31. Perez	Javier
32. Ponce	Marco A.
33. Quinones	Eduardo
34. Ramirez	Jose
35. Rangel	Alberto T.
36. Salazar	Donato
37. Sanchez	Adrian

Change former paragraph 2(b) to 2(c).
Add new paragraph 2(d):

> Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached amended notice marked "Appendix,"[2] both in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since July 10, 1998.

Dated at San Francisco, California, this 20th day of October, 1999.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow employees to wear union t-shirts or other union insignia while working.

WE WILL NOT threaten employees with plant closure if they continue their union activities.

WE WILL NOT tell employees it would be futile to seek union representation.

WE WILL NOT tell an employee he should retire rather than continue to strike.

WE WILL NOT threaten a striking employees that we will call the Immigration and Naturalization Service if the employee continues the strike.

WE WILL NOT discriminate against unfair labor practice strikers by failing and refusing to immediately reinstate them, to their former positions on the Union's unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer all the below listed unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make the strikers whole for any loss of earnings and other benefits suffered as a result of Respondent's refusal to immediately reinstate them upon their unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

1. Arteaga	Gumaro
2. Candelaria	Ronnie
3. Carra	Cesareo
4. Cobarrumias	Jesus
5. Flores	Luis
6. Gomez	Carlos
7. Gonzales	Francisco
8. Gonzales	Luis
9. Guerrero	Vicente
10. Gutierrez	Arnulfo
11. Gutierrez	Jose
12. Hernandez	Jose A.
13. Jimenez	Alfredo
14. Martinez	Abel
15. Martinez	Jorge H.
16. Mendez	Juan C.
17. Mercado	Carlos

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

18. Mercado	Gerado
19. Montano	Heriberto
20. Nava	German
21. Orellana	Luis A.
22. Peregrino	Nicholas
23. Pimentel	Felipe
24. Ramirez	Amador
25. Ramirez	Joel
26. Rangel	Armando
27. Reyes	Guerrero
28. Rojas	Joel
29. Rueda	Juan C.
30. Santana	Ramon
31. Santana	Victor
32. Terriquez	Manual
33. Vargas	Ramon
34. Vazquez	Melchor
35. Verdeja	Abel
36. Verdusco	Joaquin
37. Zermeno	Hector

WE WILL also offer all the below listed unfair labor practice strikers, who unconditionally offered to return to work, subsequent to those listed above, immediate and full reinstatement to their former jobs:

1. Alvares	Juan Manuel
2. Anchondo	Carlos
3. Arias	Cuauhctemoc
4. Cano	Mario
5. Chavez	Joel
6. Cruz	Manuel
7. Curiel	Isalas
8. Curiel	Santos
9. Del Rio	Rodolfo
10. Delgado	Hilario
11. Diaz	Rufino E.
12. Fileto	Luis S.
13. Gomez	Arturo
14. Gomez	Clemente
15. Gomez	Jose A.
16. Gonzalez	Fabian
17. Hernandez	Raul
18. Horia	Joaquin
19. Ibarra	Francisco
20. Leon	Manuel
21. Maldonado	Antonio
22. Martinez	Gabino
23. Mendez	Valentin
24. Meza	Eduardo
25. Meza Rios	Eduardo
26. Michel	Jaime
27. Michel	Sergio
28. Moreno	Sergio
29. Padilla	Jaime
30. Parra	Leopoldo
31. Perez	Javier
32. Ponce	Marco A.
33. Quinones	Eduardo
34. Ramirez	Jose
35. Rangel	Alberto T.
36. Salazar	Donato
37. Sanchez	Adrian

PRECISION CONCRETE